

1 REPORTER'S RECORD

2 APPELLATE COURT CAUSE NO. AP-76,000 76100

3 TRIAL COURT CAUSE NO. 04-CR-3453-C

4 VOLUME 14 OF 25 VOLUMES

5 THE STATE OF TEXAS) IN THE DISTRICT COURT

6 VS.) 94TH JUDICIAL DISTRICT

7 JOHN HENRY RAMIREZ) NUECES COUNTY, TEXAS

8

9 INDIVIDUAL VOIR DIRE

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20 On the 18th day of November, 2008, the following
21 proceedings came on to be heard in the above-entitled and
22 numbered cause before the Honorable BOBBY GALVAN, Judge
23 Presiding, held in Corpus Christi, Nueces County, Texas:

24 Proceedings reported by Machine Shorthand.

25

FILED IN
COURT OF CRIMINAL APPEALS

OCT 06 2009

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1 Q. All right. Let me ask you this. We asked this
 2 question of jurors: How would you vote right now if you had to
 3 vote?

4 A. Well, I would have to vote not guilty because I
 5 wasn't there to see it.

6 Q. Yeah, that's right. Now, that's not a real world
 7 example. The real world example is the State will present some
 8 evidence, and then you need to decide whether they've proven
 9 their case beyond a reasonable doubt. What if they don't?

10 A. If they don't?

11 Q. If you hear some evidence and you think, well, you
 12 know, there is some evidence that he did it. I think he might
 13 have done it, but I don't think they've proven it beyond a
 14 reasonable doubt.

15 A. He's not guilty.

16 Q. That's exactly right.

17 All right. Now, the next thing. As part of
 18 this, if they don't have a burden of proof, then he doesn't
 19 have to testify, right?

20 A. That's right.

21 Q. Constitution says he doesn't have to testify. You
 22 can't make him testify. But it goes deeper than that. See,
 23 it's not just he doesn't have to testify. It's also the jury
 24 can't hold it against him. Some people say they would. Some
 25 people say, "Well, I got to hear both sides of the story before

10
 1 I can make a decision." This isn't like that, okay? This
 2 isn't a race between these two sides and see who crosses the
 3 finish line. This is a race to see if the State can get over
 4 the line of reasonable doubt. Are you following me?

5 A. Yes, sir.

6 Q. So, can you follow that law and not hold it against
 7 the defendant if he chose not to testify?

8 A. Yes, sir.

9 Q. Okay. Now, let's talk about the case itself. Okay.
 10 Let's talk about the allegation. The allegation is capital
 11 murder. What's that? Well, it's murder at least, right,
 12 because it's got it in the word? Capital murder. Well, what's
 13 murder? It's the intentional taking of the life of another,
 14 correct?

15 A. Correct.

16 Q. All right. What's the capital part? Well, when you
 17 say capital in the law, that means the death penalty is a
 18 possibility, okay? The legislature has laid out a list of --
 19 and they're all murder cases. They're all homicides, all
 20 right, homicide plus something else. Capital murder is murder
 21 plus, okay?

22 A. Okay.

23 Q. And that's in the State of Texas. Now, special
 24 circumstances. In this case, the State is alleging that the
 25 murder occurred while in the course of committing a robbery or

1 attempting to commit a robbery. Well, what's a robbery? Well,
 2 a robbery is the forcible taking of property from another, or
 3 maybe threats -- threats of force, and to obtain property,
 4 okay? Are you following me?

5 A. Yes, sir.

6 Q. Example: I go rob you, I pull out a gun, I point a
 7 gun at you. You give me your wallet, okay? That's a robbery.
 8 All right. What if I pull a gun at you and you -- you don't
 9 give me your wallet? You punch me in the face and knock me
 10 out. Am I guilty of robbery? No, but I'm guilty of attempted
 11 robbery.

12 A. Attempted, yeah.

13 Q. The State can get there either way. So what the
 14 State needs to prove is that this defendant on the given day in
 15 Nueces County, Texas, did commit or attempt to commit robbery,
 16 and in the process, commit murder, okay? Those are two serious
 17 felonies. And the legislature says, you know, if you put two
 18 serious felonies -- these two together, that's enough, okay?
 19 Are you following me?

20 A. Yes, sir.

21 Q. All right. There's a lot of elements because you got
 22 two big crimes. The law says they have to prove all the
 23 elements to get to capital murder. Would you hold them to that
 24 burden?

25 A. Yes, sir.

12
 1 Q. All right. Now, in that case that you sat where they
 2 had a -- when was that, by the way?

3 A. About eight years ago or something.

4 Q. That may have been before they changed the law. It
 5 used to be you had to have a jury trial even if it was agreed,
 6 okay? It may have been -- was it agreed?

7 A. Yes, both attorneys pretty much told us the jury that
 8 --

9 Q. To find him incompetent?

10 A. Yes. So, that's why it was like 30 minutes and that
 11 was it.

12 Q. Well, they've changed the law on that, so we don't do
 13 it that way anymore, if there's an agreement. But in the old
 14 days, that's what you had to do.

15 This is a little different. In this case, kind
 16 of like you did in that case, you have the trial and you go
 17 back and you deliberate, and the only issue is, is he competent
 18 or incompetent to stand trial, right?

19 A. Right.

20 Q. And you make the determination.

21 In this case what will happen is, if you're
 22 selected, you'll go back and you'll deliberate after the first
 23 part of the case, which is Mr. Skurka here is gonna try to
 24 prove that this defendant is guilty of capital murder as
 25 alleged in the indictment, okay?

1 A. Okay.

2 Q. All right. And if you go back there and you find him
3 not guilty, the case is over with, all right? If you find him
4 guilty, we go to a second part.

5 Now, there's two things that can happen in a
6 capital murder case: Life in prison or death. Both really
7 serious punishments; you'd agree, right?

8 A. Yes, sir.

9 Q. I mean, you know, either way it's a bad deal, all
10 right?

11 A. Yes, sir.

12 Q. It's all -- but you don't go back and decide, well,
13 you know what, life, death, okay? I will tell you, the
14 decision is only -- can only be made by a jury. It can't be
15 made by anybody else. The president of the United States can't
16 order a death penalty. There's no one in this country that can
17 order such a thing, except the people of this country, okay?
18 And that's the jury.

19 Now, when you go back to deliberate, like I
20 said, you don't put life or death. You answer questions, and
21 here's the first one. If you'll look over your shoulder here.
22 "Is there a probability that the defendant would commit
23 criminal acts of violence that would constitute a continuing
24 threat to society?" What does that mean? Is it probably true
25 that the defendant will be violent with people in the future,

1 -- and the personal moral culpability of the defendant."

2 Okay. That's a handful, right?

3 A. Yes.

4 Q. All right. The lawyers wrote that. But what it
5 means is this: It sort of means how morally guilty is he. Let
6 me give you an example. Two burglars, okay? One, he likes to
7 use cocaine and party with hookers, okay? So he breaks into a
8 house and he steals all the TVs, he trashes the place, I mean,
9 just ruins the house, takes everything of value, sells it. He
10 goes off, does -- you know, spends it on hookers and cocaine,
11 okay?

12 A. Okay.

13 Q. Second burglar, he has lost his job that he worked at
14 20 years, and he's got three kids that are hungry and they
15 haven't eaten in three days, and he goes into somebody's house
16 and he steals food, and he doesn't break anything, he doesn't
17 steal the TVs. All he does -- and he hasn't eaten either, but
18 he doesn't even eat himself. He just gives the food to the
19 kids. They're both guilty, right?

20 A. Right.

21 Q. But their personal moral culpability is not the same.

22 A. Right. It's totally different.

23 Q. Totally different, because one of them did it for
24 selfish reasons, right?

25 A. Right.

1 okay? You can't know that for sure.

2 A. Right.

3 Q. But you do have to answer this question. It's just
4 probably, okay?

5 Now, you can answer yes or no. Then you answer
6 Question 2. "After taking into consideration all of the
7 evidence, including the circumstances of the offense -- well,
8 what's that? That's the first part of the trial, okay, the
9 crime itself. -- the defendant's character and background,"
10 well, let's talk about that. Character. What's that? What
11 kind of guy is he, right? You know, is he a trustworthy
12 person? Is he an honest guy? Is he not, you know, is he a
13 good guy, bad guy? All right. Are you following me?

14 A. Yes, sir.

15 Q. Maybe other than this incident, he's been a great guy
16 all his life, okay?

17 A. Okay.

18 Q. Maybe he was a war hero, maybe he was in Desert Storm
19 and he saved a whole platoon of soldiers risking his own life,
20 okay?

21 All right. And his background, what's that?
22 Well, maybe his military career, maybe his job, maybe he had a
23 job with a company, his childhood, right?

24 A. Right.

25 Q. Just his whole background, all right, his whole life.

1 Q. And one of them did it for somebody else. That's
2 what that question's about. All right.

3 Then, "Is there sufficient mitigating
4 circumstance or circumstances to warrant a sentence of life
5 imprisonment or a death sentence be imposed?" What's
6 mitigating? That means to lessen, lessening circumstances.
7 Remember I told you like the war hero story?

8 A. Right.

9 Q. Maybe he was a war hero. That might be a mitigating
10 circumstance, okay? Maybe he was an Eagle Scout. Maybe he did
11 community service. There's any number of things, okay, and
12 these lawyers will try to tell you what mitigating
13 circumstances are, or aggravating circumstances, like maybe a
14 criminal history. Maybe he's been in trouble a bunch, okay?
15 We don't know at this point.

16 The point is, this question asks you to look at
17 everything, not just what happened that day, his whole life,
18 everything that gets presented to you, good and bad, all right?
19 And determine whether there are sufficient mitigating
20 circumstances, sufficient circumstances in his favor to warrant
21 life or death, okay? Look, the fact that maybe he saved all
22 those soldiers, is that an excuse for the crime? No, you found
23 him guilty. He's getting punished, okay? He's getting a life
24 sentence or he's getting a death sentence, okay? It's not an
25 excuse for the crime, but maybe it might help him here. Maybe

1 it won't. Maybe you say, "You know what, it is a mitigating
 2 circumstance that is in his favor, but, you know what, it's not
 3 sufficient to warrant life rather than death." All right. And
 4 then the jury would answer that yes or no.

5 A. Right.

6 Q. Okay. The beginning of the trial I always -- I raise
 7 my right hand and the jury has to raise their right hand, and I
 8 say, "Do you solemnly swear that you will render a true verdict
 9 based upon the law and evidence presented to you?" And then
 10 they say yes.

11 I need to know from you if you can take that
 12 oath. And before you answer, some people cannot take the oath
 13 because they cannot participate in a process that could lead to
 14 someone's death for whatever reason. Maybe their church says
 15 that. Maybe they just feel that way, all right? And that's
 16 okay for them to feel that way, but they can't follow the law.
 17 Flip side, some people feel like if they find the defendant
 18 guilty of capital murder, they're always getting the death
 19 penalty. They're not gonna follow -- they're not gonna go
 20 through this process that the law requires. Neither of those
 21 people can be fair jurors in this trial. Why? Because they
 22 can't follow the law. Remember, I told you at the beginning,
 23 we're looking for people that can follow the law?

24 A. Yes, sir.

25 Q. I need to know from you, can you follow the law or

1 Q. And they may be overlapping, right?

2 A. Right.

3 Q. Well, I mean, here's the deal. Can you do this
 4 though?

5 A. Yes, I can.

6 Q. Okay.

7 A. I know I can.

8 Q. Because that's him right over there.

9 A. Right.

10 Q. Okay?

11 A. Right.

12 Q. You may have to make a decision that could -- that
 13 could decide whether he lives or dies, okay?

14 A. Right.

15 Q. Now, we've had a lot of jurors come in here and say,
 16 "I'm not real excited about being on this jury." Well, you
 17 know, what, kudos to them because I don't want people to be
 18 happy about being on this jury, okay?

19 A. Right.

20 Q. But the thing is, it's a decision that we have to do.
 21 It's a decision we have to make. And, you know, of course, we
 22 don't know if we're gonna get there. Maybe they don't prove
 23 their case against him, right?

24 A. Right.

25 Q. But we have to talk to you now because we don't get

18

20

1 can you not participate for one of those other reasons?

2 A. Can I speak?

3 Q. Yes.

4 A. In that question there that they gave me the last
 5 time that I came in here.

6 Q. Uh-huh.

7 A. It pretty much asked me that same question. And can
 8 I follow the law? Yes, I can. I did write on there I am a
 9 minister. At this point in time I'm pretty much the pastor of
 10 my church, and I can be totally honest with you and tell you
 11 that I believe in my heart that only God is giver and taker of
 12 life. But I also believe that the Bible says that I need to
 13 obey the laws of the land, so I follow what the law of the land
 14 tells me to follow, and how to follow it.

15 Q. Well, you know, I've heard people say, "You know,
 16 there's God's law and there's man's law."

17 A. Right.

18 Q. Okay? Now, in this case maybe they overlap, right?

19 A. Right, yes.

20 Q. You know, because God's law doesn't have to do -- if
 21 I blow a speeding -- if I blow a stop sign, you know, there's
 22 no God's law, you know, right?

23 A. Right.

24 Q. But, you know, this is a little different.

25 A. Right.

1 to talk to you again.

2 A. Right.

3 Q. Okay? So you can -- you think you can do this?

4 A. I know I can.

5 THE COURT: All right. Mr. Skurka.

6 MR. SKURKA: Thank you.

7 VOIR DIRE EXAMINATION

8 EXAMINATION BY MR. SKURKA:

9 Q. Hello, Mr. Vera, how are you today?

10 A. Fine.

11 Q. We're gonna talk about some things, and we're gonna
 12 talk about some issues that the judge has hit on a little bit.

13 I may go into a little more detail with you. What I want to
 14 tell you at the very beginning is there's no right or wrong

15 answers. I don't want you to answer in such a way where you
 16 think, gosh, I better say it this way because that's what

17 Mr. Skurka wants to hear, or I'll say it this way because
 18 that's the way the judge wants me to say it. We just want to

19 hear what your feelings are, okay, to see if you're qualified
 20 as a juror. And what I'm trying to say is it's just -- it's

21 okay to say you can't do things, just as it's okay to say you
 22 can do things.

23 A. Right.

24 Q. You see what I'm saying?

25 A. Yes, sir.

1 Q. Certain times people say, "Well, you know, I can sit
 2 on other kind of cases, but I can't sit on this one." It's
 3 okay for them to say that. Some people say, "Well, gosh, I
 4 better say it this way or the judge will get mad at me." I
 5 don't think this judge is gonna get mad at you for telling me
 6 how you feel. Okay?

7 A. Yes, sir.

8 Q. So knowing all that, let's talk about -- I want to
 9 explore a little bit more with your feelings about the death
 10 penalty. If I'm reading you right, it sounds like you're
 11 saying in my heart, in my religious beliefs, I'm not supposed
 12 to take somebody's life because only the big guy upstairs can
 13 make that decision. But you also say, Hey, I live in this
 14 world, and we have to obey laws. And you know, some of the Ten
 15 Commandments are, you know, the same as the laws, right? Thou
 16 shall not steal, thou shall not kill, stuff like that. But
 17 there's kind of a conflict on that one about thou shall not
 18 kill because obviously you're not supposed to murder somebody,
 19 but then you may be put in a position where you on this jury
 20 may have to kill somebody. And I hate to be so blunt about
 21 that.

22 A. No, I understand.

23 Q. You see the dilemma, I guess, you're looking at.
 24 And, you know, I'm not a preacher, obviously. I'm just a
 25 lawyer trying to do his job, but I just kind of need to know

1 Catholics will say, well, because of the church's teachings, I
 2 cannot give the death penalty because I have to follow the
 3 church. And I know that's man's law and stuff, but, I just
 4 can't follow those teachings. Other people say like you say,
 5 Well, the Bible says an eye for an eye, you know, or I'm not
 6 supposed to kill somebody, depending on how you feel about
 7 certain things. I'm just wondering -- to me, it's just -- to
 8 me, I would be in a predicament if somebody told me one thing,
 9 but my teachings are something else. And I don't know if the
 10 word "wrestling over it" is a good word but, you know, because
 11 it's clearly you thought about this?

12 A. Right.

13 Q. So it's kind of come up either before or when you
 14 found out this was a capital murder case, right?

15 A. Yes, sir.

16 Q. So what kind of -- did you think about this a lot
 17 when you were filling out the questionnaire? Have you thought
 18 about it since? Have you changed anything? Are you still
 19 pretty much feeling that way?

20 A. Well, I'm gonna put it to you in the terms that I
 21 know how to do it. I didn't think about it. I prayed about
 22 it. And I prayed and I asked God, you -- if this is what you
 23 want for me, then it's gonna happen. And I'm willing to do
 24 what needs to be done. And if this is not what you want from
 25 me, then you're gonna make it happen, and it's not gonna take

1 how you feel about that dilemma you're placing in this case.
 2 And there's nothing wrong with being a pastor. There's nothing
 3 wrong with feeling that way. I just kind of need to know how
 4 it will affect you being on this kind of case.

5 A. Well, affect me, I don't think it's gonna affect me
 6 in any way wrong. My thing is, as like I was saying that when
 7 you preach, you know, as a pastor, when I preach, I do my best
 8 not to become a hypocrite, you know. And I want to be able to
 9 teach my kids because I'm also a youth minister. But I want to
 10 teach my kids the right and wrong biblically, you know. And
 11 that's why I wrote in the paper that I know what the Bible
 12 says. I don't know it all, you know, but I strive to learn it
 13 the best way that I can. But I also know that it says for me
 14 to abide by the laws of the land. And so if I don't abide by
 15 the laws of the land, not only do I feel I get punished by the
 16 law, but even by God. You know, I mean, there's consequences
 17 that we put ourselves in, so, because of our consequences of
 18 the sins that we commit in life, we have to pay the price. And
 19 it doesn't mean that God can never forgive you for it, but
 20 that's the consequence of what you have to go through in life.

21 Q. Well, you said that very eloquently. And I think
 22 you -- you realize obviously the -- I guess, I don't know,
 23 moral dilemma that we have. And we've had all kinds of
 24 religion, people -- Catholics, Protestants, Methodists,
 25 whatever, and they say different things. Sometimes the

1 place. And I'm at ease with what God wants for me in my life.
 2 And if I need to be a juror, then God is going to bless me to
 3 be a juror, you know. And I'm gonna be a fair juror. I'm not
 4 gonna be one that's not gonna be fair, not one that's gonna
 5 think, I think he killed somebody, I think he needs to
 6 be -- no, if you bring me the evidence that says that he did
 7 this, then I'm gonna be -- I'm gonna know what to find him as.
 8 If they bring me the evidence that he didn't do it, then I'm
 9 gonna know that he didn't do it, you know. I believe that the
 10 ball's in your court --

11 Q. It should be. You're right.

12 A. -- not in my court. And until you prove because --
 13 you know, I'm gonna be totally honest with you. When I first
 14 found out what this was about, I had already forgotten about
 15 this, what I saw on TV, until I was called for jury and I saw
 16 what you-all presented to me there. My thing is, is that I
 17 stopped to say, I got to put myself in his position, you know.
 18 I mean, I want somebody to be fair also with me if it was me,
 19 you know. That's just the way I see it, you know. I'm at ease
 20 with what has to be done. You know, I don't feel that God's
 21 telling me, no, you shouldn't do this. I just feel that what
 22 takes place in here if I get picked as a juror, I know God is
 23 gonna be with me, and he's gonna allow me to pick the right
 24 thing that needs to be picked.

25 Q. A couple of the things you said I want to go back

1 over because what you said, "the ball's in my court," that's a
 2 pretty good way of saying it. As the judge said, they don't
 3 have to prove anything. We have to prove the case beyond a
 4 reasonable doubt. And I'm not worried about that because
 5 that's my job. I'm here because I expect to prove it to you
 6 beyond a reasonable doubt.

7 But I'm just kind of thinking about this, put
 8 yourself in my position. You said you put yourself in his
 9 position. You're sitting over here on this table and we have a
 10 person whose basically against killing somebody, right, because
 11 of God's law, and you may end up on this jury as opposed to,
 12 say, somebody else whose not as in the position you're in. And
 13 I'm wondering if it's going to be in the back of your mind
 14 thinking like, you know, is this really what God wants me to
 15 do, or are you gonna be troubled by that? I appreciate you
 16 saying you prayed for it and for guidance and everything, but
 17 it's kind of lingering with me whether I'm thinking like, gosh,
 18 you know, he says this, but maybe in the back of his mind when
 19 he actually gets in there he's gonna think, well, maybe God
 20 doesn't want me to do this. Am I gonna be able to go preach on
 21 Sunday after on Wednesday deciding somebody should die? How
 22 can I tell my people, like you said, be a hypocrite? How can I
 23 tell my people don't kill anybody when I just voted to kill
 24 somebody?

25 A. Well, yeah.

1 my kid, I want him to die, you know. If this person deserves
 2 what it was proven to him, then that's what needs to be done.
 3 Q. Well, I find your passion very rewarding the way
 4 you've given this a lot of thought. And whichever way you feel
 5 is okay. It's like what the judge said the very first thing
 6 was, are you gonna be okay to do this or are your personal
 7 feelings gonna interfere with you being a juror? It's as
 8 simple as that?

9 A. I think I would be okay.

10 Q. Okay. You don't think it will interfere?

11 A. No.

12 Q. And you won't go back thinking, oh, my gosh, what
 13 have I done voting this way?

14 A. No.

15 Q. Now, you said something else. You said something
 16 else about the defendant may -- you know, we have to prove
 17 this, and he has to prove this. But I -- can you hold on just
 18 a second.

19 MR. SKURKA: Judge, can we take a quick break
 20 on this before I finish up on this?

21 THE COURT: Yeah. Can you wait in the jury
 22 room for just a second?

23 VENIREPERSON NO. 85: Yes, sir.

24 (Venireperson exits courtroom.)

25 MR. SKURKA: Judge, I was handed a note by the

1 Q. You see what I'm saying? I'm not trying to put you
 2 on the spot, but it's a fair question, right?

3 A. Right. I understand. Like I said, if that was -- if
 4 that was the case where we had to decide whether to give him
 5 the death penalty or we found him guilty -- if that was the
 6 case, I don't feel in my heart that I wouldn't be able to go
 7 back to preach. I wouldn't feel that in my heart because I'm
 8 doing the just thing, the justice that needs to be done here on
 9 this earth, you know.

10 Of course, like, for instance, the judge had
 11 explained to me a while ago that the only way that I would even
 12 consider the death penalty is that if you can prove that he
 13 wasn't somebody well enough to be in society, somebody well
 14 enough to do -- he was a bad, bad person. He was a person that
 15 didn't, you know, deserve a second chance. If he was a person
 16 that just, like he said, with the robbery, cocaine, a person
 17 that's -- his theory in his mind of just harming people, you
 18 know. You know, I tell you, like I said, you know, I was
 19 instructed not to talk to anybody about this or nothing, but I
 20 did talk to God, and I stopped to think, you know, as a
 21 minister, as a pastor, it's real hard, sir, because in the
 22 sense of what if this was my kid that got murdered, you know
 23 what I'm saying? Would I think, God, I'm sorry, but I don't
 24 want this man to be alive. See, I have to really swallow, as a
 25 minister, that because it's not so much that because he killed

1 defense that I think we want to agree to excuse this person.

2 THE COURT: Is that right?

3 MR. JONES: Well, the thing that disturbs me,
 4 I mean, I like this guy. He's obviously a good fellow, but I
 5 want him to be making his decision and not him having some
 6 perception that he can -- God's gonna be telling him what to
 7 do, you know, so --

8 THE COURT: Fine by me. If you want to agree
 9 to let him go, fine by me.

10 MR. SKURKA: We agree, Judge, from the State.

11 THE COURT: Okay.

12 MR. JONES: I mean, you know, --

13 THE COURT: Bring him in.

14 MR. JONES: -- no telling what he'll do.

15 (Venireperson enters courtroom.)

16 THE COURT: All right. Mr. Vera, you -- we do
 17 appreciate you coming down here. And we really appreciate you
 18 giving careful attention and thought to this case. You're
 19 not -- you didn't get selected to be on the jury, but we do
 20 appreciate your time, okay?

21 VENIREPERSON NO. 85: Thank you.

22 THE COURT: Thank you very much.

23 (Venireperson exits courtroom.)

24 THE COURT: Okay. Let's go off the record.

25 (Discussion off the record.)

1 THE COURT: All right. We got 87 here. That
 2 was you-all's call so --

4 VENIREPERSON NO. 87,
 5 GUADALUPE LOPEZ,
 6 VOIR DIRE EXAMINATION

7 EXAMINATION BY THE COURT:

8 Q. All right. How are you?

9 A. Pretty good.

10 Q. All right. You are Guadalupe Lopez?

11 A. That's me.

12 Q. All right. Let's talk about some stuff. We are
 13 looking for open-minded jurors. We are looking for people that
 14 can follow the law, okay? Do you think you can be open-minded
 15 in this case?

16 A. As far as I know, I can.

17 Q. Okay. Well, some people can't. Some people say, You
 18 know what, man, they indicted him, that's good enough for me,
 19 okay? I think that's a -- I personally think that if we lived
 20 in a society where the State just said you were guilty, and you
 21 were, that would be a pretty sorry place to live, quite
 22 frankly.

23 A. Sure.

24 Q. There are places like that in the world, and I don't
 25 want to live there, okay?

1 doubt. You may have heard that if you're a fan of *American
 2 Justice* or something.

3 A. I believe in American justice.

4 Q. No, I mean, the TV show. Have you ever seen that,
 5 the TV show, *American Justice*? In fact, I think they even did
 6 a story on the Selena case. But anyway, the point is this:
 7 That's the burden of proof. It's a high burden. We don't have
 8 a definition, but I like to illustrate what it is by showing
 9 what it's not, okay? Civil case. Contract dispute between two
 10 companies. One company sues another. What's the burden of
 11 proof? It's called preponderance of the evidence. Kind of
 12 like probably, all right? 51 percent, if you will, just
 13 tipping the scales of justice ever so slightly. All right.
 14 Then a higher burden than that in some civil cases, most
 15 notably when they try to take away a person's kids from them
 16 because maybe the State says this parent is neglectful, okay?
 17 Clear and convincing is the burden of proof. And that sounds
 18 like strong language, right?

19 A. Yes.

20 Q. Clear and convincing. Well, this burden is beyond a
 21 reasonable doubt. It's higher than that, all right? It is not
 22 beyond all doubt. It is not beyond a shadow of a doubt because
 23 if it was beyond all doubt you'd have to have been there,
 24 right? You'd have to have seen the thing happen itself. And
 25 if you saw it, you would be disqualified from being on the

30

32

1 A. Yes.

2 Q. Okay. Then let's talk about some stuff. Let's see
 3 here. You haven't been on a jury before. That's okay. No
 4 prior experience necessary, okay?

5 A. Fine. I qualify.

6 Q. You do qualify, but we're gonna find out if you can
 7 follow the law.

8 First of all, this is a criminal case, and every
 9 criminal case the law says the State has the burden of proof.
 10 You agree with that, correct?

11 A. Correct.

12 Q. And the idea is, hey, you brought the charges and you
 13 prove them. You prove them to the people of this community.
 14 And if you can do that, that's fine. But until you do, this
 15 man over here is innocent until proven guilty, and that's all
 16 our rights, every person in this country. People say, we, the
 17 citizens. It's even more than, we, the citizens. It's every
 18 person in this country that's within these borders is entitled
 19 to those rights, citizen or not. You can be an illegal alien,
 20 and you're still entitled to these rights, okay?

21 Now, if you had to vote right now, of course,
 22 you'd have to vote not guilty, right, because they haven't
 23 presented any evidence to you? Do you follow me?

24 A. Yes.

25 Q. Now, the burden of proof is beyond a reasonable

1 jury. You'd be a witness.

2 A. Yes.

3 Q. Okay. Beyond a reasonable doubt, and the key word in
 4 that phrase is "reasonable," okay? Do you think you understand
 5 where we're at?

6 A. Sure, I understand.

7 Q. You can hold them to that burden?

8 A. Of course.

9 Q. All right. Next thing, the law says defense has no
 10 burden, none. The State's got the whole burden, all right?
 11 Burden never shifts over here. And as such, the Constitution
 12 of the United States says, hey, look, it really makes sense
 13 because it says, hey, look, if they don't have a burden, then
 14 he doesn't have to testify, okay, because they don't have a
 15 burden. And I submit there's a lot of reasons why, maybe his
 16 lawyers tell him not to because they don't think that the case
 17 has been proven, right?

18 A. Right.

19 Q. Maybe he's not a good person in front of people. You
 20 know, some people when they speak and they're nervous, they
 21 give people the wrong impression. I had a friend like that.
 22 He got nervous; he'd laugh inappropriately. And it would annoy
 23 people. They thought he was being -- he was being -- I don't
 24 know, mocking them or something. And he was just nervous,
 25 okay? I don't know. My point is this. There's lots of

1 reasons why somebody may not want to testify, but the point is
 2 they can't make him. And it's even further than that. The
 3 jury can't hold it against him. In other words, you can't go
 4 back there to deliberate and say, you know what, we got the
 5 State's case, the defense didn't put on a case, so I'm gonna --
 6 that's points for the State. You can't do that. All right.

7 Some people say, "Well, I got to hear both sides
 8 of the story." No. It doesn't work like that. This is not a
 9 race between this table and that table to see who crosses the
 10 finish line. It's only a race to see if that table crosses the
 11 line of reasonable doubt because they're the only people
 12 running here, okay?

13 A. Okay.

14 Q. So I need to know from you, would you follow that law
 15 and not hold it against the defendant if he chose not to
 16 testify?

17 A. I will.

18 Q. All right. Now, what kind of case is this? This is
 19 called capital murder. And what does that mean? Well,
 20 certainly, there's murder involved, right? That's the
 21 allegation?

22 A. Uh-huh.

23 Q. What's a murder? Murder is the intentional taking of
 24 the life of another, okay? And the capital, what does that
 25 mean? Well, capital means death penalty is a possibility. And

1 Q. Well, I don't know what the facts are, but there's
 2 attempt or commit, either one.

3 A. Okay.

4 Q. Okay? They can get there either way. I don't know
 5 what the facts are going to be. The charge says he committed a
 6 murder while in the course of committing or attempting to
 7 commit a robbery. They get there either way, okay?

8 A. Right.

9 Q. But they can't just -- they don't get there to
 10 capital murder just with the murder, all right? That's not to
 11 say he wouldn't be guilty of murder if they can prove that.
 12 He's got to be guilty of capital murder, okay? Do you have
 13 anymore questions about that?

14 A. No, just --

15 Q. Well, I mean, it's something that you're -- you know,
 16 jurors come up here, and all of a sudden, there's this thing
 17 that you're not used to dealing with, and it's serious and, you
 18 know --

19 A. It's just the words that are coming out, you know,
 20 attempt and then I have to question that.

21 Q. I want you to. I want you to. This is a serious,
 22 serious case, okay? This is why -- see, normally in a jury
 23 selection we bring everybody in, and we do it all at once,
 24 right?

25 A. Right.

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 1 the legislature has drawn out certain situations, all of them
 2 involve a homicide, and they -- it's like murder plus, okay?
 3 In this case it's murder plus robbery. And if they can prove
 4 that, then defendant's guilty of capital murder. If they
 5 can't, well, that's the end of the case, right?

6 A. Right.

7 Q. What's a robbery? Well, let's say I came and I
 8 pulled a gun on you. I said, "Give me your wallet." You gave
 9 me your wallet. That's a robbery. I had a cousin the other
 10 day, he told me, "Oh, Bobby, I got robbed." I said, "Really?
 11 What happened?" He said, "Yeah, they broke into my store." I
 12 said, "Well, that's not robbery," okay, because he wasn't
 13 there. That's a burglary. Robbery is when someone forcibly
 14 takes something from you, okay, either by force or through
 15 threats. Let's say I held a gun to you, and you punched me and
 16 you didn't get -- I didn't get your wallet. I attempted to rob
 17 you, right? Okay. The State can get there either way. In
 18 other words, what they need to show to win is that the
 19 defendant attempted or committed a robbery, and in the course
 20 of doing so, he killed somebody. That's the elements of the
 21 crime essentially. The law says they have to prove it all, all
 22 the elements, and there's nine or ten. I don't know. Would
 23 you make them prove all their elements?

24 A. So the key word is "attempt" as long as the attempt
 25 is made?

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 1 Q. This is so serious, we do it one at a time.

2 A. I understand.

3 Q. Because we don't want to make a mistake.

4 A. Correct.

5 Q. Okay. But you're following me there, right?

6 A. Yes.

7 Q. Would you make them prove all of their elements
 8 before you found anyone guilty of capital murder?

9 A. That's what I'm here for.

10 Q. All right. Very good. That's what we want. All
 11 right. Next thing. There's two things that can happen if
 12 someone's found guilty of capital murder, life in prison or
 13 death sentence. Both very serious punishments, okay? Those
 14 are the choices. But the jury doesn't go back and say life or
 15 death, okay? First part of the trial you hear about, well, can
 16 they prove it beyond a reasonable doubt this defendant did the
 17 crime? Jury finds him guilty. We go on to the second part.
 18 Jury finds him not guilty, that's the end of the case.

19 But if we go to the second part, you answer
 20 questions. Okay. Here's the first question, if you look over
 21 here. "Is there a probability that the defendant would commit
 22 criminal acts of violence that would constitute a continuing
 23 threat to society?" Well what does that mean? Well, is he
 24 probably gonna do violence to others in the future. That's
 25 that question. And the jury would answer that yes or no, okay?

1 A. Yes.

2 Q. And then answer Question 2. "After taking
3 consideration of all of the evidence, including the
4 circumstances of the offense --" what's that? That's the first
5 part of the trial, guilt or innocence phase. "-- the
6 defendant's character --" Okay, well, what's that? What kind
7 of guy is he? Is he an honest person? Is he a good guy?
8 Other than this occasion, has he been a good person during his
9 life? His background. What's that? Well, maybe his
10 childhood. Maybe he was abused as a child. Maybe he came from
11 a great upbringing, okay?

12 A. Okay. This second one is his character and his
13 background before the alleged --

14 Q. No, it's his character and background -- it could be
15 up to now. It could be up to now. His whole life, okay?

16 A. Okay.

17 Q. And see, the second part -- the first part, all
18 you're gonna hear about is the crime itself. And they're gonna
19 try and prove that he did it. Maybe they can; maybe they
20 can't, all right? The second part's different. The second
21 part you hear about everything in his life. It can be -- it
22 can be his character now. It can be his character before the
23 crime, his whole life, okay?

24 A. Yes.

25 Q. And his background, same thing. Maybe, you know, you

1 burglary, right?

2 A. Yeah.

3 Q. But is their personal, moral culpability the same?

4 A. No.

5 Q. Not at all. One is driven for self, very selfish
6 reasons, right?

7 A. Right.

8 Q. Not even good selfish reasons. And the other one is
9 driven by the need to help his kids.

10 A. Right.

11 Q. All right?

12 A. Yes.

13 Q. That's what that question's about -- I mean, that
14 part of the question's about, okay? You need to take into
15 consideration -- it's sort of like, you know, how guilty is he.
16 Does that make sense? With that question, it makes sense,
17 right? What are his motivations? You're looking at me with a
18 blank look.

19 A. You're trying to tell me how much bad and how much
20 good.

21 Q. Well, that's what you got to consider. See that's
22 exactly what you got to consider, okay? You got to consider
23 everything. Those two people, those two burglars, you wouldn't
24 punish them the same, would you?

25 A. No.

1 hear about he was in the military or maybe you hear, you know,
2 he did well in school. He was an Eagle Scout, you know, stuff
3 like that.

4 A. Okay.

5 Q. "And the personal moral culpability of the
6 defendant." Okay. That's a handful, right? That's a little
7 wordy. Legalese is what I call that. Okay. Well, let's talk
8 about that. Let me see if I can give you an example to make
9 you understand what this is talking about. Two burglars -- I
10 mean, yeah, two burglars, okay, they both break into a house.
11 Burglar one -- they're both found guilty, okay? Burglar one,
12 what was his motive? Well, he broke in because he likes to
13 party with hookers and use cocaine, all right? So he breaks
14 into this house, and he just trashes the place, takes
15 everything of value, their TVs, VCR, video game, jewelry,
16 everything. And then just tears the place up, breaks down the
17 door to get in. And then he goes, and he sells all the stuff
18 and blows it all on hookers and cocaine. They finally catch
19 him. Then you find out he's been to prison twice before, okay?

20 Second guy, worked at the same job 20 years,
21 lost his job because they laid him off, can't feed his kids.
22 The children haven't eaten for three days. He hasn't either.
23 But he goes into an unopened door -- an unlocked door, and he
24 steals food; doesn't even eat the food, just gives it all to
25 the kids because they're starving, all right? Both guilty of

1 Q. No, not at all. And that's what it's saying.

2 A. That's what it says.

3 Q. Then, "Is there a sufficient mitigating circumstance
4 or circumstances that warrant a sentence of life imprisonment
5 rather than a death sentence be imposed?" Mitigating
6 circumstances, mitigating meaning to lessen, okay? Lessening
7 circumstances. Maybe you find out that he was a war hero in
8 Desert Storm, and he saved 20 soldiers risking his own life,
9 and he got a Bronze Star, maybe even a Congressional Medal of
10 Honor. Would that be a mitigating circumstance? It might be.
11 It might be. Only the jury can decide what a mitigating
12 circumstance is. These lawyers will suggest to you what they
13 think it will be, but only the jury decides. And you may
14 decide, well, he was a war hero. I think that's a mitigating
15 circumstance. Is it an excuse for the crime? No. We found
16 him guilty, and he's going to be punished. But is it a
17 mitigating circumstance? You might say, yes, it is. Okay?

18 A. Yes.

19 Q. Maybe you say it's not. All right. That's up to the
20 jury.

21 So the jury decides take in everything. Maybe
22 there's bad stuff about him. Take that in, too, okay? And
23 then you decide is there sufficient mitigating circumstances to
24 warrant life or death because you may say that's a mitigating
25 circumstance, that fact that he was a war hero, the fact that

1 he was an Eagle Scout, the fact that he was just a good guy in
 2 the community, but it's not sufficient to warrant life rather
 3 than death, okay? Or maybe it is. But the jury has to answer
 4 this question yes or no. This is just taking everything that
 5 you're presented, everything, and process it. Do you follow
 6 me?

7 A. I follow you.

8 Q. Okay. Now, the beginning of every trial I ask the
 9 jury to take an oath. Do you solemnly swear that you will
 10 render a true verdict based upon what, the law, and the
 11 evidence as given to you. And they say yes. Some people
 12 when -- and the reason I'm telling you this is because I want
 13 to know if you can take this oath in this case. Now, before
 14 you answer, some people say, "I cannot because I cannot
 15 participate in a process that may lead to someone's death."
 16 Others will say, "If I find him guilty, this law means nothing
 17 to me, I'm not considering it, I'm gonna answer these questions
 18 in a way that he will get the death penalty, and I don't care
 19 what your evidence is. I will not consider it."

20 Neither of those people can take that oath,
 21 okay, because they're not following the law.

22 A. Yeah.

23 Q. I need to know if you can take the oath. And if you
 24 can't, it's really okay. We'll get somebody else. But if you
 25 can, I need to know that too?

1 A. I'll follow the law to the T.

2 Q. All right. Mr. Skurka.

3 MR. SCHIMMEL: May I proceed, Your Honor?

4 THE COURT: Sure. Mr. Schimmel.

5 VOIR DIRE EXAMINATION

6 BY MR. SCHIMMEL:

7 Q. Mr. Lopez, my name is George Schimmel. I'm one of
 8 the prosecutors in here. This is Mark Skurka.

9 A. Hi.

10 Q. I just want to ask you a couple of questions and go
 11 over some of the stuff the judge talked about with you about,
 12 kind of see how you feel about this stuff. What I want to make
 13 sure that you get right now is that it really doesn't matter
 14 what you say. There's not a right answer or wrong answer.
 15 We're just kind of trying to figure out how you feel about some
 16 of this stuff. This is the one chance we get to ask these
 17 questions. If you do get selected to be on the jury and
 18 something comes up, I'm not allowed to talk to you about what's
 19 coming. So no right or wrong answers, so I just want to go
 20 over some stuff.

21 The first issue is, you've been on a jury
 22 before, haven't you?

23 A. No.

24 Q. Never, ever?

25 A. Never.

1 Q. Okay. How did you feel when you came to the
 2 courthouse and you found out that -- what kind of case this
 3 was? It was a death penalty case, and you saw all the people?

4 A. I just took it as a regular -- another doing my duty
 5 like I'm supposed to. It's call in for jury duty, death,
 6 whatever, that's my duty to do it.

7 Q. So it could have been a traffic ticket case --

8 A. It could have been whatever, but the thing is I got
 9 called and I'm doing my duty.

10 Q. Okay. What would it -- how would it make you feel to
 11 end up being on a jury where you had to make that kind of
 12 decision?

13 A. I've made them before. I made them when I was 18
 14 years old.

15 Q. Yeah, I saw that in your questionnaire. You said you
 16 made a lot of life or death calls?

17 A. Yes.

18 THE COURT: You were in Vietnam?

19 VENIREPERSON NO. 87: Yes.

20 Q. (By Mr. Schimmel) You were in the Army?

21 A. Yes.

22 Q. From '62 to '70?

23 A. To '70.

24 Q. What kind of stuff did you have to do that you had to
 25 make life or death calls there?

1 A. When I was in Nam, I took over my platoon, 18 years
 2 old. I had a 12-man squad. I had to send them out LPs, OPs,
 3 bushes, ambushes, you know, search and seizure, destroy. We
 4 fought for three nights and two days. You know, those are my
 5 people. I had to take care of them. When I made a decision,
 6 it was either life or death. When I sent them out there to do
 7 their duty, just like I do it. If they do their duty, I do my
 8 duty. And I just don't stay behind and send them out to do
 9 whatever they have to do. I do it with them. That's why I'm
 10 saying, I'm here to do my duty, and I do my duty. That's what
 11 is called for.

12 Q. Okay. So it doesn't sound like you'd have a huge
 13 problem being a juror in this kind of case?

14 A. I don't.

15 Q. Now, you were asking the judge some questions earlier
 16 about whether all this stuff has to do with the word attempt or
 17 something. I want to go over with you what a capital murder
 18 is. The judge did. I want to get through a little bit also.
 19 It's a murder that's a different kind of murder. I mean, you
 20 might have a case where a guy chops up his wife, and he puts
 21 her in a suitcase, and he mails her pieces of her body to Cuba,
 22 right? And that's nothing but a murder, just a plain and
 23 simple murder. And it might surprise you -- because that
 24 sounds like a pretty bad murder, but that guy whoever did it,
 25 couldn't get the death penalty. But some murders are

1 different. If you kill a child under the age of six, if you
 2 kill a police officer while he's doing his police officer job,
 3 or if you murder somebody while you're robbing them or, I
 4 guess, burglarizing them or something like that. Those cases
 5 are different and they become the -- the law says they're
 6 capital cases. In those cases the death penalty can be
 7 something that the State seeks. So it's not really about -- I
 8 mean, the only issue is whether or not -- I guess you're okay
 9 with that law. It sounds like you are. But we're not really
 10 trying to prove an attempt or not an attempt or anything. The
 11 only issue is it's a murder, and then it has this thing added
 12 on to it. It's a murder plus a robbery, or murder plus a rape,
 13 or murder plus --

14 A. I understand what you're saying. The thing is, see,
 15 I already know what the judge explained to me.

16 Q. Yeah.

17 A. I know exactly what he said. But see, now I'm
 18 hearing it from you, you're trying to implement me with the
 19 death capital murder and all this stuff, you know, and I
 20 already heard it from him, and you're telling me the same thing
 21 he's telling me. It's like if I go get picked for the jury,
 22 that's what I'm gonna have in my mind, you know. I don't need
 23 to hear that whatever you're explaining again, the death
 24 penalty and the criminal and the robbery and all this other
 25 stuff. Capital murder is capital murder, and I understand it.

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 1 decides life or death -- and I don't want to waste your time
 2 and go over this stuff the judge already went over with you,
 3 but it's those two things right behind you. You answer those
 4 special issues. And there are a couple of things I want to
 5 cover with you on that one over your left shoulder, Special
 6 Issue No. 1. I just want to go over some of the things it says
 7 that other jurors have had problems with.

8 It says, "Is there a probability that the
 9 defendant would commit criminal acts of violence that would
 10 constitute a continuing threat to society?" Okay. It says, is
 11 there a probability? Probability. It doesn't say, Mr. Lopez,
 12 are you positive that he's gonna go out and do something bad
 13 again. It doesn't say that. It says probability. What does a
 14 probability mean to you?

15 A. That maybe or maybe not.

16 Q. Exactly. It's like -- it's like 51 percent versus 49
 17 percent. Not exactly 50/50, maybe a little better than 50/50.
 18 Okay. Do you know why it doesn't say is there a certainty that
 19 he would go out and do bad stuff?

20 A. Why?

21 Q. Uh-huh.

22 A. You don't know the person in the first place.

23 Q. That's exactly right, because there's no possible way
 24 that anybody could know that, but God. You don't have a
 25 crystal ball. You just don't know.

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 1 But he explained it to me, you explained it to me, and if I get
 2 picked, if I get picked, I'm going in there or I'm coming in
 3 here, and I'm already seeing capital murder, capital murder,
 4 capital murder. You know, how many times do you have to
 5 explain it to me? I understand what it is.

6 Q. Mr. Lopez, I'm sorry. I didn't -- I'm not trying to
 7 talk at you or anything, but it's just that I heard you ask a
 8 question to the judge, and I didn't know if you wanted to ask
 9 me that question also. I was just giving you a chance to do
 10 that if you wanted to. I'm sure you can understand all this.
 11 I think you can. I just wanted to cover some of this in case
 12 you had a question for me about it. That's all.

13 A. No, I don't.

14 Q. Okay. Well, let's talk about the way that the trial
 15 works then. What happens first is that there's the guilt and
 16 innocence part of the trial. Just like any trial in this
 17 country, a jury decides on whether or not somebody's guilty or
 18 not guilty. But where it changes in this kind of case is that
 19 after that, normally juries would decide a punishment in the
 20 case. You have the guilty part of the trial, the
 21 guilt/innocence, and then you'd have punishment. And then a
 22 jury would kind of pick maybe a number they thought was
 23 appropriate or probation or something like that. But this case
 24 is different. And the only issue really, after the guilty
 25 verdict, is life or death. That's it. And the way that a jury

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 1 Next, it says criminal acts of violence. A lot
 2 of jurors get hung up on the idea that that criminal act of
 3 violence has to be another murder or another rape or another
 4 robbery or something like that. And it's true that those are
 5 all criminal acts of violence, but it doesn't have to be that
 6 way. You might think he's gonna go out and commit an assault,
 7 and that's a criminal act of violence, right?

8 A. Right.

9 Q. So I just don't want you to think going into this
 10 that in order to consider this, you have to say, oh, yes, he's
 11 gonna go out again, and he's gonna commit another murder.
 12 That's not what the law says.

13 And the last thing is that part of the bottom
 14 where it says you think he might be a continuing threat to
 15 society, okay. Sometimes people say, "Well, hey, man, if this
 16 guy's locked up, how can he be a threat to society because
 17 you've locked him up, you stuck him in a hole. How is he gonna
 18 get out and hurt somebody, right?" I mean, a lot of people say
 19 that. But here's what we say when they ask us that question.
 20 Who else is in a prison with prisoners?

21 A. Same prisoners.

22 Q. Well, okay, prisoners, yeah. What about the people
 23 who take care of them?

24 A. Yeah, the guards, yeah.

25 Q. The guards. What about the people that feed them?

1 A. Yeah.

2 Q. And nurses, and maybe even like a warden, people like
3 that, chaplains who show up. The point is that just because
4 you put somebody in prison, it might change a lot of your
5 social obligations. It might change, you know, the normal
6 society you hang out in, but it still is like a society. So
7 just because you get put in prison, it doesn't mean you can
8 never hurt anybody.

9 A. Of course not. You can even hurt yourself so, you
10 know, I understand where you're coming from. I understand
11 every bit that you're telling me.

12 Q. Okay.

13 A. There's a lot of risk, whether he's free or whether
14 he's not free. Whether he's in prison, he's still, you know --
15 there's a lot of ifs, buts, and ands.

16 Q. Okay. The other thing, if you read that question and
17 you decide, yes, I think that -- I think the defendant is going
18 to -- there's a probability he's going to commit these future
19 acts of violence.

20 At that point then you go to that one, the
21 Special Issue No. 2. And basically it's just saying, you
22 consider all the evidence. You consider -- you consider the
23 offense, which you've already heard about. You consider
24 character and background, what you talked to the judge about,
25 and you consider moral culpability. You consider all that

1 Q. Okay. What happens is that after an arrest, a case
2 is presented to a grand jury, all they do is decide whether or
3 not there's enough evidence to charge somebody. The cops have
4 probable cause. Was the cop wrong in doing this? Is he okay
5 to, you know, arrest this person? And if the jury says, yes,
6 he's okay to arrest that person, he gets indicted, just like
7 that. So it's not -- it's not evidence of guilt because it's a
8 different standard of proof. It's like way down here and the
9 beyond the doubt stuff is way up here. So I just don't want
10 you to hold it against him that he's gotten indicted because
11 that's not fair.

12 A. Well, you can't do that, not at that stage. Geez.

13 Q. Well, I mean, at all during the whole trial because
14 all that's happened is that a grand jury said I think a cop had
15 enough information to file charges. That's it.

16 Another issue is -- it's the Fifth Amendment,
17 but what it means is that he don't have to testify. Now, a lot
18 of people say, "Oh, I'd like to hear both sides of the story.
19 I need to hear both sides of the story," and stuff like that.
20 I think that's a natural response. If anybody told you a joke
21 and then walked away before they told you the punch line, you'd
22 wonder what was wrong with them and you'd want to know what was
23 coming, right? But this is really different. Here, the law
24 says -- the Constitution actually says that you can't even
25 consider the fact that the defendant doesn't testify. You

1 stuff. And then you ask yourself, is there something that
2 mitigates all that? Is there a sufficient mitigating
3 circumstance that would tell me that I should do life instead
4 of death? All that's saying is, is there something that would
5 lessen the punishment? That's it. They're -- they're strange
6 words to you. I don't know why they have to use those
7 particular words because they don't make anybody except lawyers
8 honestly, but is there something that would lessen the
9 punishment? That's it. Even if you hear from somebody who
10 said, "Oh, yeah, this guy helped me walk across the street
11 every morning," you know, that could be a mitigating
12 circumstance for you. It could be, or it could not be, just
13 like the judge said. The only issue at this point is whether
14 you can say, yes, I'm willing to consider -- I'm willing to
15 listen to possible mitigating circumstances. That's it. You
16 don't have to promise us what they're gonna be, anything like
17 that. You just have to say, yes, my mind's open to all those
18 things. And, I mean, I think you've already said that, and you
19 can say that, right?

20 A. Of course.

21 Q. Now, there are a couple of things I'd like to go over
22 with you, too, just sort of legal things. One of them has to
23 do with the indictment. Are you familiar with how that process
24 works?

25 A. No.

1 can't even talk about it. You're not supposed to think about
2 it. I'm not sure the law can tell you what to think about, but
3 you're not supposed to comment on it, and you're not --
4 specifically, you're not supposed to consider it as a
5 circumstance against him because a person can decide not to
6 testify for a million reasons. He might be -- he might be
7 scared of you. He might think -- he might be intimidated by a
8 jury. He might get nervous. He might stammer. He might
9 sweat. He might do something that his lawyers thought would
10 make him look guilty, and then, even if it's not he shouldn't
11 testify. So there are a lot of reasons why you can't consider
12 that against him. And you can't actually even be a juror
13 unless you can basically promise us that you won't hold that
14 against him.

15 A. I understand if -- if even by advice of his lawyers
16 not to testify, hey, that's the way it goes.

17 Q. That's the way it goes. And that's not something
18 you're gonna think about or worry about --

19 A. Of course not.

20 Q. Okay. That's great.

21 Another issue -- the judge talked to you about
22 this a little bit -- I want to cover just really quickly is the
23 idea of beyond a reasonable doubt. Now, you said somewhere in
24 your questionnaire when we asked you what the number one
25 argument for or against the death penalty, you wrote "proof

1 beyond doubt." And that's pretty much right. But we sometimes
 2 get a little nervous about that because really the standard is
 3 beyond a reasonable doubt. And it used to be that I was
 4 allowed to come up and to read you a definition of what that
 5 meant, and we'd all be happy, you know, we'd be done. But the
 6 law changed, and I can't actually even really tell you what it
 7 means. I mean, used to be that I could just define it and now
 8 I can't. But basically beyond -- when you ask yourself about
 9 beyond a reasonable doubt, you're asking yourself two
 10 questions. You hear all the evidence, and you say to yourself,
 11 do I have a doubt? Do I have a doubt about whether this person
 12 did what they're saying he did? Do I have a doubt? If the
 13 answer is no, well, that's it. You vote guilty, and you're
 14 done.

15 Maybe you say though, yeah, I have a doubt.
 16 Then you ask yourself if you do have a doubt, whether you have
 17 a reason for the doubt. And it's got to be a reason based on
 18 the evidence. Some people sometimes will say, Well, you know,
 19 he's so young and his mom probably loves him, and I have a
 20 doubt. That's not the same thing as a reasonable doubt because
 21 that doubt wouldn't be based on the evidence. You see? That
 22 doubt would just be based on someone feeling sorry for
 23 somebody.

24 A. That's based on your heart and emotions on that one.

25 Q. Right. Right. And that's not what it's supposed to

1 during the whole trial even after you think that he's guilty.
 2 It's a presumption, but it's a presumption that can be
 3 destroyed as soon as you hear evidence that convinces you
 4 otherwise. Does that make sense?

5 A. It makes sense to a certain point, but, you know,
 6 that's -- that only comes if you only hear one side, but see,
 7 you got two sides here, and that decision is not gonna be made
 8 until you're in that room, and then you go over everything
 9 that's done.

10 Q. That's true.

11 A. Everything.

12 Q. That's true, but you know, like I was saying earlier
 13 though, it's sort of like you're in a joke without a punch
 14 line. You might not hear from the other side. I mean, a
 15 defendant doesn't actually have to testify.

16 A. No, I'm not talking about defendant. I'm talking
 17 about the people representing him. Those are the ones that are
 18 gonna speak for him. Those are the ones gonna say, hey, you
 19 want to take the stand, take the stand. If you don't want to
 20 take the stand, don't take the stand. Those are the ones that
 21 advise him. Those are the defense attorneys. Those are the
 22 ones that are gonna present the evidence that goes for him, and
 23 you're gonna present the evidence that goes against him.

24 Q. And if they want to do that, they can do that. I
 25 mean, it's their right to do that. But it might be the defense

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1 be. The doubt's supposed to be based on the evidence that you
 2 hear, and it's supposed to go toward an element of the offense.
 3 In other words, it's a doubt that makes you think maybe he
 4 didn't actually do it.

5 If you -- if you do have a doubt, but it's not a
 6 doubt based on the evidence, then you can still convict him?

7 A. Yeah, well, the doubt is there until all the evidence
 8 on both sides is presented. Then you -- then you can, I guess,
 9 take it from there and see where it leads, I guess.

10 Q. That's mostly true. There's something I want to go
 11 over -- another thing I want to talk to you about, sort of
 12 along those lines. It's -- I think you're gonna hear about it
 13 from the other side also, but it's called the presumption of
 14 innocence. You've heard that before, right?

15 A. Yes.

16 Q. Okay. What that means is that a defendant is
 17 presumed innocent during the trial. And as he sits here right
 18 now, he's just a guy sitting here right now. He's not somebody
 19 whose gonna get convicted, anything like that. He's innocent
 20 until he's proven guilty. All right? He's presumed innocent.

21 It's sort of like a force field or like a bubble
 22 around somebody, and if you hear evidence from the evidence
 23 chair, the witness stand right there, and that evidence makes
 24 you think that he's not innocent anymore, well, that bubble
 25 just got popped. It's not something that you have to keep up

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1 thinks, "Well, gosh, State, you know, the burden of proof here
 2 is beyond a reasonable doubt, and we think that you didn't make
 3 your burden. We think that you only got half the way there
 4 instead of all the way there, so we're not gonna put on
 5 evidence at all." And that's their right. So what that means
 6 then at that point is you would have heard all the evidence
 7 from the State, you would have heard nothing from the defense,
 8 because they don't have to tell you anything, and because they
 9 think that we haven't done our job, and then you go back and
 10 then you deliberate. So you don't get to say, well, let's
 11 consider the State versus the defense. You don't get to do
 12 that. All you get to do is consider the State's evidence and
 13 say is that enough?

14 THE COURT: Unless, of course, they do present
 15 some evidence. Then you can consider it, whatever they
 16 present.

17 MR. SCHIMMEL: Right.

18 A. But you're gonna have 12 minds in there. It's not
 19 just one.

20 Q. (BY MR. SCHIMMEL) It's just -- I don't want you to
 21 hold it against the defense if they don't put on evidence
 22 because they don't have to. The law says they don't have to.
 23 They're not required to. And in some cases, they don't want
 24 to, I mean, because they think we haven't done our job.

25 A. Okay.

1 Q. Okay.

2 A. Okay.

3 Q. So this presumption of innocence stuff, just going
4 back to it, the only thing I was talking to you about that was
5 just that I don't want you to think that the presumption of
6 innocence is something that's there forever and ever and ever.
7 As soon as you hear evidence that would overcome it or destroy
8 it or undo it, that's enough.

9 Q. Okay. I want to talk to you just for a second
10 about some of the stuff that you wrote in your questionnaire
11 too. Do you really have seven kids?

12 A. Yes.

13 Q. And you said that one of your favorite things to do
14 is hunt and fish and hang out with your grand kids?

15 A. Yeah.

16 Q. How many grand kids do you have?

17 A. I have 12.

18 Q. That's a lot of grand kids. It probably gets pretty
19 expensive around Christmas time.

20 A. I just finished taking care of my newborn. I took
21 care of him from day one to about a year. That's what I did
22 when I retired, took care of him while his mother went back to
23 work. In fact, he grew up with me, so, you know, he calls me
24 daddy, you know; but he's got his daddy. I take care of him.
25 That's what I was here for. I guess that's why I was spared in

1 bearings for the choppers --

2 Q. Oh, okay.

3 A. -- and fixed wing and rotary.

4 Q. Like taking them out and repacking them and stuff?

5 A. No, no. We used to rework them, everything, inspect

6 them.

7 THE COURT: You rebuilt the whole thing,
8 right?

9 VENIREPERSON NO. 87. Rebuild, yeah.

10 Q. (By Mr. Schimmel) And is that what you did for 36
11 years?

12 A. Thirty-six years, yeah.

13 Q. A long time. I've got one more question to ask you
14 about. You wrote somewhere that I think that you would
15 probably tend to believe police officers a little bit more than
16 the average person?

17 A. Well, see, that comes from -- that comes from a
18 background, from my fathers, you know, where they say, you
19 know, the police officer is there to do his job and, you know,
20 tell the truth, and that's how I was brought up, you know.
21 And, you know, the bad guy is the bad guy, and the good guy is
22 the good guy.

23 Q. I understand, Mr. Lopez. I want to let you know the
24 law says you pretty much have to consider a police officer as a
25 witness. You can't give him more credibility just because he's

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1 Nam while running in that jungle out there, you know. Seven
2 kids are all mine. And no, no two wives, no three wives, or
3 four wives. It's just me and my wife. We had seven kids. A
4 lot of people say, "You got seven? How many wives you got?" I
5 only got one.

6 Q. And you -- you worked at CCAD, right?

7 A. Yeah.

8 Q. And you worked there for --

9 A. Thirty-six years, seven months and 14 days.

10 MR. SKURKA: How many hours? I'm just teasing
11 you.

12 A. I don't know.

13 Q. (BY MR. SCHIMMEL) Was it a pretty good job?

14 A. It was a great job. I did my job. I mean, I know a
15 lot of people say this and that, but I did my job because I did
16 it for the soldier in the field. That's what we're there for.
17 A lot of people don't understand that that's what the job is
18 for, see. And now, you got a lot of people in there saying,
19 you know, the war is bad, and, you know, we should get out. I
20 say what are you doing here. This is a war machine, this is --
21 this is for the soldier in the field so they can fight, you
22 know. If that's your feeling, you shouldn't even be in here,
23 you know.

24 Q. What did you do there?

25 A. I used to be a bearing worker. I used to clean

1 a cop. Maybe you can give him more credibility because of his
2 training or experience or something, but you can't just say,
3 well, I believe cops just because they have --

4 A. Maybe it's just how he words -- how he puts his words
5 into, you know, describing what happened or what not happened,
6 you know, but overall.

7 Q. But you can promise to consider a police officer
8 witness just like any other witness?

9 A. Of course.

10 Q. Okay. I think that's all I have for you. Do you
11 have any questions for me?

12 A. No. I think we explained that's supposed to be done,
13 I guess.

14 Q. I think you're right.

15 A. There's no if, buts and ands. Like I told you, I'm
16 here to do a job, I'm here to do a duty to the best of my
17 ability. If that's not enough, then I don't know what else can
18 be done.

19 MR. SCHIMMEL: Well, thank you, sir. We
20 appreciate your service. I'll let the defense talk to you
21 now.

22 MR. JONES: Can we have a preliminary hearing,
23 please?

24 THE COURT: Yeah. Can you wait in the jury
25 room, Mr. Lopez?

1 VENIREPERSON NO. 87: Sure.
 2 (Venireperson exits the courtroom.)
 3 MR. GARZA: Judge, we're gonna go ahead and
 4 exercise a peremptory strike.

5 THE COURT: Is that No. 10? Looks like it.
 6 MR. GARZA: I've been around guys like that
 7 for a long time. So has Mr. Jones. Believe me, he -- he
 8 makes fast decisions.

9 (Venireperson enters courtroom.)

10 THE COURT: All right. Mr. Lopez, we
 11 appreciate your service. You were not selected to be on this
 12 jury, but we do appreciate you coming down here. It's people
 13 like you that keep this thing going.

14 VENIREPERSON NO. 87: That's fine. Thank you,
 15 sir.

16 (Venireperson exits courtroom.)

17 THE COURT: All right. Let's see, are we
 18 ready for the next one?

19 MR. JONES: What number --

20 MR. GARZA: Can we take a little break?

21 THE COURT: That was peremptory 10.

22 MR. GARZA: You're gonna give us at least a
 23 couple of extra or no? Just kidding. We'll be here forever.

24 (Recess.)

25 THE COURT: Let's get Evelyn Reyes.

1 Q. Do you agree with that?
 2 A. Yes, sir.
 3 Q. All right. Now, the burden of proof is beyond a
 4 reasonable doubt. And what's that? Well, there's no
 5 definition. But I'm gonna tell you what it is by defining what
 6 it's not, okay? If this was a civil case, the burden of proof
 7 would be preponderance of the evidence, like maybe a contract
 8 case or something?

9 A. Uh-huh.

10 Q. All right. That's kind of like if you can imagine
 11 the scales of justice tipping it just ever so slightly, maybe
 12 51 percent, if you will. Higher burden than that is clear and
 13 convincing, okay? Clear and convincing evidence is the kind of
 14 evidence they use in some civil cases and in some special
 15 circumstances. But, most notably, let's say the State's trying
 16 to take away someone's parental rights because they think
 17 they're bad parents. That's the burden they use, clear and
 18 convincing. That sounds like strong stuff; you'd agree, right?

19 A. Uh-huh.

20 Q. That's just not willy-nilly evidence. That's strong
 21 stuff. Well, this burden's higher than that, beyond a
 22 reasonable doubt. I've told you what it's higher than. Let me
 23 tell you what it's less than. It's not beyond all doubt, okay,
 24 because if it was -- the only way it could be beyond all doubt
 25 is if you saw it, right?

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1 VENIREPERSON NO. 88,
 2 EVELYN REYES,
 3 VOIR DIRE EXAMINATION

4 BY THE COURT:

5 Q. Hi, you are Evelyn Reyes; is that right?

6 A. Yes, sir.

7 Q. All right. Well, obviously, you know we're looking
 8 to pick a capital murder jury, okay? And we are looking for
 9 people who can keep an open mind. Is that you?

10 A. Yes.

11 Q. Okay. Because some people can't, and that's okay
 12 too. We need to know if you can follow the law also. We're
 13 gonna talk about that. You've never been on a jury before.

14 That's okay.

15 A. First time.

16 Q. No experience necessary.

17 Okay. Now, this is a criminal case. What that
 18 means is the State's got the burden of proof. The law says you
 19 bring the charges; you prove them, okay? Do you follow me?

20 A. Uh-huh.

21 Q. The law says if that's the case, then the defendant
 22 is innocent until proven guilty. And that's really everybody.
 23 We're all innocent until the State can prove otherwise, okay?
 24 Do you follow that?

25 A. Uh-huh.

1 A. Right.

2 Q. If you saw the alleged incident, then you would know
 3 beyond all doubt one way or the other, right?

4 A. Yeah.

5 Q. But it's not that, okay, because you'd have to be a
 6 witness instead of a juror.

7 The key word is beyond a reasonable doubt --
 8 reasonable, okay? All right. Next thing. Can you follow
 9 that?

10 A. Uh-huh.

11 Q. And can you hold them to that burden?

12 A. Uh-huh.

13 THE REPORTER: Can you say yes or no, please.

14 Q. (By the Court) Yeah, you've got to say yes or no
 15 because she's taking it down in, and uh-huh doesn't come out
 16 too good. Okay.

17 Now, as part of that, the Constitution of the
 18 United States says, look, the defense has no burden. And if
 19 the defense has no burden, the defendant doesn't have to
 20 testify, okay? Maybe -- and I think there's lots of reasons
 21 why that may be true. Maybe his lawyers tell him not to.
 22 Maybe they say, "Hey, look, maybe they haven't proven their
 23 case. In our professional opinion, we don't think that it's
 24 proven their case." And maybe he gets nervous in front of
 25 people and just his lawyers think you're just gonna come across

1 wrong even if you're not guilty. You're just -- some people
 2 just don't do well in front of crowds. You agree with me
 3 there, right?

4 A. Yes.

5 Q. Okay. I mean, some people do; some people don't.
 6 Some of us get a lot of practice at it; some of us don't.

7 All right. My question is, though -- well, let
 8 me tell you this. The law says, it's even more than the fact
 9 that he doesn't have to or can't be made to testify. It's more
 10 than that. The jury that's selected can't hold it against him.
 11 All right. So I need to know from you, would you hold it
 12 against him if he chooses not to testify?

13 A. No.

14 Q. Some people say they would. They say, "Well, I got
 15 to hear both sides of the story before I could make a
 16 decision." It's not really like that. It's not a race to the
 17 finish line here. The only race is to determine whether the
 18 State can cross the line of proof beyond a reasonable doubt.
 19 That's the only race that's going on here. All right?

20 Now, this is a capital murder case. And what
 21 does that mean? Well, it's obviously murder, right? That's
 22 the allegation is murder because it's in the -- it's in the
 23 word capital murder. And what's that? The intentional taking
 24 of the life of another. All right. And the capital part means
 25 the death penalty is a possibility. The legislature has given

1 A. Huh?
 2 Q. In other words, there's a lot of elements. Elements
 3 are the things that make up the crime like, you know, this
 4 defendant on this given day in Nueces County, Texas, while in
 5 the course of committing robbery. And, of course, robbery has
 6 those elements, commits a homicide, okay? The law says they
 7 got to prove everything. They don't get to prove eight out of
 8 nine or nine out of ten, how many there are. They got to run
 9 the table. Would you require them to do that?

10 A. Yes.

11 Q. Okay. Now, trials in Texas work like this. It's a
 12 bifurcated system. What does that mean? Well, that means
 13 there's two parts. Part one, guilt or innocence. The jury
 14 that's selected will determine whether the State can prove this
 15 defendant is guilty of capital murder. The jury goes back to
 16 deliberate. If they find him guilty, we go to the second
 17 phase. If they find him not guilty, we stop, okay? Not
 18 guilty; case is over. But if there is a guilty finding, we go
 19 on to part 2 and that part 2 is the punishment phase, we call
 20 it.

21 Now, also there's only two things that can
 22 happen if you're found guilty in Texas of capital murder, that
 23 is, life in prison and the death sentence. Both serious deals,
 24 okay? But you don't say life or death. You answer questions,
 25 okay? And here's the first one. "Is there a probability that

1 us a laundry list of situations, all of them involving murder,
 2 that murder plus something else gives you the capital murder,
 3 okay? It's murder plus. In this case, murder plus robbery or
 4 attempted robbery. Well, what's that? Well, robbery is the
 5 forcible taking of property of another through either force or
 6 threats of force. So if I came and held a gun to you and I
 7 said, "Give me your purse," and you give me your purse, that's
 8 a robbery, right? Okay. Are you following me?

9 A. Yes, uh-huh.

10 Q. Attempted robbery; what's that? Well, let's say I
 11 came and held a gun to your head -- not to your head, but
 12 pointed it at you, and you took your purse and you hit me on
 13 top of the head with it. And then you happened to have a
 14 bowling ball in there, and you knocked me out, okay? I would
 15 not be guilty of robbery, but I would be guilty of attempted
 16 robbery. The State in this case must prove -- the allegation
 17 is that this defendant committed a murder while committing a
 18 robbery or an attempted robbery. Two major crimes together is
 19 what gets us to capital murder, okay? Are you following me?

20 A. Yes.

21 Q. Okay. But they don't have to prove robbery. They
 22 can prove attempted, okay? There's a lot of elements to that
 23 because you've got two crimes here, okay? But would you hold
 24 them to their burden proving all the elements of the crime
 25 before you found the defendant guilty?

1 the defendant would commit criminal acts of violence that would
 2 constitute a continuing threat to society?" Okay. What does
 3 that mean? Well, is he probably gonna be violent with people
 4 in the future, all right? That's what that means. And the
 5 jury would answer that yes or no, okay?

6 A. Okay.

7 Q. All right. Next question. "After taking into
 8 consideration all of the evidence, including the circumstances
 9 of the offense" -- well, what's that? That's the first part of
 10 the trial, okay -- "the defendant's character and
 11 background" -- All right, what's that? Well background is
 12 obviously how you grew up, right, your childhood, but it can be
 13 background all the way up until this moment, all right? And
 14 then defendant's character. Well, what kind of a guy is he?
 15 You know, is he an honest person? Other than this day, was he
 16 a great guy? Maybe -- I don't know, he's just -- you know,
 17 he's always somebody you can count on, that kind of thing.

18 And the personal moral culpability of the
 19 defendant. Okay. That's -- that's a little harder, you know,
 20 to understand what that is. Let me give you an example so you
 21 understand this. Two burglars, okay? One breaks into a house
 22 just trashes the place, pulls everything down, steals
 23 everything of value, okay, TVs, VCRs, you know, the Wii game,
 24 everything, jewelry, everything, okay? And he sells it all,
 25 and he gets his money and he spends it on cocaine and hookers,

1 okay? And he -- that's his deal.

2 The second guy lost his job of 20 years. His
 3 children haven't eaten in a couple of days. He goes into a
 4 house, not for himself, but to feed the kids. He takes food.
 5 He's hungry himself, but he doesn't even eat the food. He
 6 gives it all to the kids so they can eat that day, all right?
 7 Can you see how the personal moral culpability of those people
 8 is different?

9 A. Yes.

10 Q. That's what that question is about, okay?

11 "Is there a sufficient mitigating circumstance
 12 or circumstances to warrant life imprisonment rather than a
 13 death sentence be imposed?" Okay. What this question is
 14 asking you to do is circumstances of the offense. What kind of
 15 guy is he? His background, moral -- personal moral
 16 culpability. Take all this stuff into considering. Everything
 17 that's presented to you at the whole trial, not just the first
 18 part, because the first part is just, you know, evidence about
 19 whether he did it or not. The second part, stuff about his
 20 whole life, okay? And then you digest it and you determine
 21 whether there's sufficient mitigating circumstances to warrant
 22 life.

23 What is sufficient mitigating circumstances?
 24 Well, mitigate meaning to lessen circumstances. For example,
 25 let's say he was in Desert Storm, a war hero, and he saved 20

1 evidence presented to you." Okay? And the jury says yes.

2 A. Yes.

3 Q. But some people can't do that in this case because it
 4 involves a death penalty. They say I can't -- I can't do it
 5 because I cannot participate in the process that could lead to
 6 a death penalty potential. Or, others would say, "If I find
 7 him guilty, I don't care about your law. I'm not gonna follow
 8 your law. I'm gonna answer these questions in such a way he
 9 gets the death penalty every time if I find him guilty."

10 Neither of those people can take the oath
 11 because they're not following the law; they're not being fair,
 12 okay? And if that's how they feel, that's okay. It's just not
 13 okay to get on the jury, all right? So I need to know from you
 14 whether you can follow that law or not?

15 A. Yes, I can follow the law.

16 Q. Okay. All right. Mr. Skurka.

17 MR. SKURKA: Thank you, Judge.

18 VOIR DIRE EXAMINATION

19 BY MR. SKURKA:

20 Q. Hi, Ms. Reyes. My name is Mark Skurka. I'm an
 21 assistant district attorney along with Geordie Schimmel, the
 22 guy that's usually sitting here, but he's running an errand
 23 right now. We'll be the ones presenting this case to you if
 24 you're selected on the jury. I want to start off by telling
 25 you there's no right or wrong answers to anything you say.

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 1 people's lives. Okay, you might think that's a mitigating
 2 circumstance. Maybe he was an Eagle Scout. Maybe he used to
 3 teach little kids to read that just -- that otherwise would
 4 never learn, okay?

5 You may think all of these things are sufficient
 6 or mitigating circumstances, okay? Is it an excuse for the
 7 crime? Well, no. He's been found guilty, all right? Not an
 8 excuse for the crime, but it may be something that would
 9 warrant you lessening the punishment, that is, giving him life
 10 instead of death. Do you follow me?

11 A. Uh-huh, yes.

12 Q. Okay. Now, what a mitigating circumstance is --
 13 these lawyers will suggest to you what they are -- only the
 14 jury gets to decide. One person may get to say, "Hey, I don't
 15 think that's a mitigating circumstance at all that he saved
 16 those guys in Iraq." And the other one may say, "I think it
 17 is." But regardless, there can be mitigating circumstances,
 18 but they may not be sufficient, may not be enough to warrant
 19 life rather than death. You may find that there are some.

20 That's not enough based upon the whole picture. That's the
 21 question you got to answer here, okay? That's a yes or a no
 22 answer that the jury would have to make, all right?

23 Now, at the beginning of every trial I ask the
 24 juror to take an oath, and that is, "Do you solemnly swear you
 25 will render a true verdict based upon the law and

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 1 Sometimes people say, Well, I better answer it this way because
 2 that's the way the judge wants to hear me say it, or the State
 3 wants to hear me or the defense wants to hear me say it. And I
 4 tell them no. You've never been on a jury before, right?

5 A. No, sir.

6 Q. And there's no problem with that. You don't have to
 7 have previous experience in here. What you have to do though
 8 is just tell us the truth about how you feel about some of
 9 these issues and everything. Some -- and there's nothing wrong
 10 with saying, "Well, for this reason or that reason I feel this
 11 way. I may not be fair not to sit on this jury, or I may have
 12 a problem sitting on this kind of jury." You see what I'm
 13 trying to say? It's okay to say you can't sit on a jury just
 14 as well as it's okay to say you can sit on a jury.

15 A. Okay.

16 Q. Okay? But we don't know you at all so we don't know
 17 where you're coming from or what your beliefs are. All we have
 18 is this little questionnaire to tell us some things, but
 19 certainly it doesn't tell us everything, okay?

20 A. Okay.

21 Q. So let's start with some of the big issues that are
 22 gonna come up in this case. The first one, as you probably
 23 know, is going to be the death penalty. When you first heard
 24 it was that kind of case -- remember that day when you came in,
 25 there was 2, 300 people in there? Did you have any idea what

1 kind of case it was going to be?

2 A. No.

3 Q. Until Judge Galvan came down and said, "Folks, this a
4 criminal case." And a lot of people go, oh, okay. And he
5 said, "And may have to decide whether the person gets the death
6 penalty." Tell me what your first reaction to that was,
7 Ms. Reyes?

8 A. First reaction was my first time getting called on
9 jury and it's a capital murder case, kind of overwhelming, I
10 guess.

11 Q. Why?

12 A. Capital murder is a big deal.

13 Q. Do you realize that when you get called for jury
14 duty, it doesn't really -- it's kind of the luck of the draw.
15 I don't want to say you won the lottery, but, you know, it's
16 kind of the luck of the draw. You know, sometimes jurors come
17 in and they're gonna be on a DWI case, sometimes they're going
18 to be on a shoplifting case, sometimes they're going to be on a
19 civil case, and then sometimes they may have to do a death
20 penalty case. I want to tell you that just because you've
21 never done one before doesn't mean that you can't do one. The
22 part that the jury plays in this case is the fact finder. You
23 have to decide what the facts are. I will tell you though that
24 some people feel -- and, you know, I saw them that day or --
25 because I watched some of the jurors. And when the judge said

1 And there's nothing wrong with feeling that way.

2 A. Yeah.

3 Q. It's just that if you can't serve on it because it's
4 this kind of case, you just need to tell us or the judge. If
5 it's because oh, my gosh, this is gonna weigh so heavily on me,
6 or I don't feel I'm experienced enough to make that kind of
7 decision, or just because my feelings are gonna be interfere
8 with me sitting on this kind of case. You just need to tell
9 us.

10 A. Okay.

11 Q. So tell us how you feel about sitting on this kind of
12 case?

13 A. I believe in the death penalty. Maybe -- I mean,
14 this is my first time. It is a little overwhelming to sit on a
15 capital murder case. I mean, I think I can do it, but then I
16 mean, I think it would be hard for me as well.

17 Q. You're gonna have to tell us a little more why and
18 why you feel that way. And remember, there's no right or wrong
19 answer. You just tell the judge how you feel if you can do it
20 or you can't do it.

21 A. I think I can do it.

22 Q. Do you want to be able to do that? Do you want to
23 make that decision?

24 A. I don't want to make that decision.

25 Q. Okay. Well, let's talk about that a little bit. You

1 it's a death penalty case, some people are -- you might have
2 noticed this around you -- people were like, "Oh, God," you
3 know. And then some people were saying like, "Well, okay, you
4 know, I guess I got to do my job." And some people were like
5 freaking out because they were thinking of something else.
6 Whichever way you feel is okay. I just kind of want to know if
7 that's how you felt, oh, my gosh --

8 A. Yeah.

9 Q. -- I can't do this kind of case. You were freaking
10 out a little bit?

11 A. (Nodding head up and down.)

12 Q. Is it because it was that type of a case?

13 A. Yes.

14 Q. Okay. Would you feel that because it's that kind of
15 case, it would be more comfortable for you to sit on a
16 different kind of case? Maybe that's not the word.
17 "Comfortable" is not a good word. Because I don't think
18 anybody wants to sit on a capital murder case. I don't think
19 people -- I mean, I would be worried about people volunteering
20 to come down here and do that kind of stuff. But there's some
21 people, and it's legitimate, whatever they think is okay with
22 us. We just need to know because some people say, "Look, Mark,
23 I believe in the death penalty. I think it's a good law. I
24 think we should do it, but I can't be the one that makes that
25 decision, you're gonna have to get somebody else to do it."

1 see what I'm saying when people come in, they think that
2 they're gonna sit on a routine case. And then some people will
3 say, "Look, I can't sit on that kind of case." Let me give you
4 an example. My wife loves animals, and one day we were going
5 down the road and I accidentally hit a cat in the car, and the
6 cat was very injured and we pulled over the side of the car --
7 pulled the car to the side of the road and tried to help the
8 cat because my wife loves animals, and this cat, I'm sorry, was
9 beyond repair; it was injured too bad. The cat was suffering.
10 My wife new that we should put the cat out of its misery
11 because it couldn't be fixed, you know, but she couldn't do it.
12 She couldn't bring herself to do that. She knew it was the
13 right thing to do. She believed that animals shouldn't suffer.
14 She believed that, but she couldn't, you know, put the cat down
15 or take it to the vet to put the cat down because it would hurt
16 her too much. You know, she's a wonderful woman and she
17 believed that, and it's not that, you know, she wanted to kill
18 a cat. It's not, but she knew in her heart that's what the
19 thing she should do. But she just couldn't do it. She had to
20 have somebody else take care of the cat and, you know, put it
21 out of its misery. Do you see what I'm saying?

22 A. Yes.

23 Q. And I don't know if you're kind of feeling the same
24 way. To me it seems like you're coming up there and saying,
25 Look, I believe in the death penalty, Mr. Skurka, I think it's

1 a good law, but, you know, push come to shove, if you're asking
 2 me if I can answer the questions in such a way that that young
 3 man is gonna die, I can't do it.

4 A. Yeah.

5 Q. So look at him and tell me, that's him, John Henry
 6 Ramirez, not somebody you read about in the paper or hear about
 7 in the news. That's him. Could you answer the questions the
 8 questions if the evidence was there in such a way that would
 9 cause another human being to be executed? Yes or no?

10 A. Yes.

11 Q. Yes you could. Okay. Okay. A minute ago you were
 12 acting like you didn't want to do it, you're not sure you could
 13 do it. So tell me about that.

14 A. I believe in it and I feel like I can do it after
 15 seeing evidence and hearing the facts. If it comes down to
 16 like hearing the whole trial, I believe I can do it.

17 Q. If you had your choice, if you could tell the judge,
 18 "Judge, I'm sorry, I just couldn't sit on this kind of case, I
 19 would be better on a burglary case, a robbery case, a theft
 20 case, I just couldn't do that," would you want to get out of it
 21 that way and try to say, you know, I understand it's my civic
 22 duty, but just put me on a different kind of case than this?

23 A. No.

24 Q. Why not?

25 A. Because I mean I feel like -- I mean I can do it. I

1 talk about that a little more. And I've read your
 2 questionnaire about how you feel about the death penalty and it
 3 says, "I feel if you committed a murder and there is enough
 4 evidence, then it is only right for the death penalty or life
 5 in prison."

6 Do you think that there has got to be a certain
 7 type of case where you could find the person guilty and give
 8 them the death penalty, or do you have -- do you have like, I
 9 don't know, preconceived notions of what kind of case that
 10 would have to be?

11 MR. JONES: Your Honor, that's not a fair
 12 question either. The law says what kind of cases the death
 13 penalty is authorized for.

14 THE COURT: I'm not really sure I even
 15 understand the question.

16 MR. SKURKA: Okay.

17 Q. (BY MR. SKURKA) Do you understand the question? I'll
 18 ask it again if you don't.

19 A. Ask it again.

20 Q. Okay. Do you know -- do you understand that there's
 21 certain kind of crimes that even qualify for the death penalty?

22 A. Capital murder.

23 Q. Right.

24 A. Which is what you explained earlier which is murder
 25 and another crime.

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1 can -- you know.

2 Q. Why do you think you can do it?

3 A. Go on what I believe.

4 Q. Just why?

5 MR. JONES: Your Honor, I -- I don't know that
 6 that's a fair question the way he's putting it to this juror.

7 MR. SKURKA: I can ask her --

8 MR. JONES: She's already said she can sit on
 9 the jury.

10 THE COURT: I'll let him ask the question but,
 11 I mean, you've asked her several times.

12 MR. SKURKA: I understand.

13 Q. (BY MR. SKURKA) I'm just trying to figure out what
 14 the root of it is, why you think you can participate in this
 15 type of case?

16 A. What the root of it is? I mean, I feel like I can.
 17 What I believe is I believe in the death penalty, and I think I
 18 can do it.

19 Q. Okay. It's just because of your belief in the death
 20 penalty?

21 A. Yeah.

22 Q. Is that right?

23 A. After hearing all the evidence and all the facts and
 24 going from there.

25 Q. Sure. I understand. When you heard -- well, let's

1 Q. Right. So you do understand --

2 A. Yeah, so I understand.

3 Q. -- there's only certain type of cases? Okay. And do
 4 you understand there are certain kind of cases that it may be
 5 that they're found guilty of capital murder but they may get a
 6 life sentence instead of the death sentence?

7 A. Uh-huh.

8 Q. Okay. You have to say yes or no?

9 A. Yes.

10 Q. You can't just shake your head.

11 A. Yes.

12 Q. Do you feel like you're leaning one way or the other
 13 towards death or life imprisonment at this time?

14 A. No.

15 Q. How do you feel about age in making the decision? I
 16 will tell you, if you're on this jury, you'll probably be one
 17 of the youngest ones on the jury. How would that affect you if
 18 at all?

19 A. It wouldn't affect me.

20 Q. How did -- what did you think of when you first came
 21 in the courtroom and the judge said what kind of case it was,
 22 and you found out who the defendant was? Because some people
 23 didn't even see him. He was sitting in that little box over
 24 there and you see him now --

25 A. I saw him that day.

1 Q. Okay. You did see him that day. How do you feel
 2 about or what did you think when you first saw the person or
 3 how young he looked?

4 A. It doesn't -- well, age really doesn't matter. I
 5 don't know how old he is now. He committed the crime.

6 Q. Okay. So would you agree with me that just because a
 7 person may look young or his appearance is one thing, you
 8 should make a decision based on what they did instead of what
 9 they looked like?

10 A. No.

11 Q. No what?

12 A. No, I don't think just on what he looks like I can
 13 make a decision on it.

14 Q. Okay. Because some people say that. We've had some
 15 ladies come in here and say, you know, the first thing I
 16 thought was, gosh, he looks so young, and stuff. And I always
 17 ask them, Well, is that gonna affect you sitting on this jury.

18 A. No.

19 Q. Okay. I asked them, and that's why I asked you.

20 A. Okay.

21 Q. Because some people say that. They could be the age
 22 of their son or something like that and they say, Well, gosh,
 23 you know, he's so young. And some people come in with the
 24 stereotype like it's going to be Charles Manson out there or
 25 some scary looking guy, and then some people are a little

1 drink or drink or get yourself high and you go commit a crime,
 2 that's not a defense to the crime, okay?

3 What do your folks do for a living?

4 A. My mom doesn't work and my dad works at a refinery.

5 Q. And did you go to school here in Corpus Christi?

6 A. I graduated from UTSA in San Antonio.

7 Q. No, I meant high school.

8 A. High school. Oh, yeah, I went to high school here.

9 Q. Which one?

10 A. King.

11 Q. And then you went off to UTSA so you've just now come
 12 back to town about a year?

13 A. I graduated last year.

14 Q. So you've been working for the city for about a year?

15 A. Yes, sir.

16 Q. Sometimes jurors say -- how do you feel about this
 17 thing. Sometimes jurors say, "Well, you know, I want to hear
 18 all the evidence and stuff, but I want to make my mind -- I
 19 want to hear both sides of the story." Would you want to hear
 20 both sides of the story in this case?

21 A. Yes.

22 Q. Okay. And what do you mean when you say both sides
 23 of the story?

24 A. Both sides of the story as in all the facts and what
 25 happened that day.

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1 surprised about that.

2 And what do you think about people who abuse
 3 drugs or alcohol?

4 A. What I think about them? I think that's wrong,
 5 anybody who abuses drugs and alcohol. I'm against all of that.

6 Q. What about people who -- sometimes use it as an
 7 excuse for their behavior? Tell us your feelings about that.

8 A. As an excuse?

9 Q. For their behavior? Well, he did that but, you know,
 10 he's an addict, or he did that but he's an alcoholic, so you
 11 can't really fault him because it's more of a medical problem
 12 instead of a legal problem; do you see what I'm saying?
 13 Because some people say, you know, yeah, he was DWI, but he's
 14 an alcoholic, you know, you can't stop that. It's a disease.

15 A. He shouldn't be driving.

16 Q. Okay. That's the other point. Because the law says
 17 you can drink all you want, you just can't drink and drive at
 18 the same time. So would you consider it more of a medical
 19 problem or a legal problem that the Court should take care of?

20 A. A legal problem.

21 Q. Okay. How about with drugs, sometimes people say the
 22 same thing?

23 A. Same thing, drugs -- you know, alcohol. I don't
 24 think there's an excuse for it.

25 Q. Okay. And the law doesn't say that. It says, if you

1 Q. So are you saying that you would want to hear what
 2 the defendant says happened that day, or would you want to hear
 3 from him?

4 A. No. I said earlier, I answered his question no.

5 Q. Okay. Would you want to -- would you expect the
 6 defendant -- I'm sorry, the defense lawyers to put on some
 7 evidence, their own witnesses and stuff, before you could make
 8 a decision?

9 A. Yes, I'd like to do that.

10 Q. Okay. Even if it's not the defendant, you would
 11 expect them to put some other witnesses on?

12 A. Yes.

13 Q. And -- okay. You understand that's a natural
 14 inclination. People want to hear both sides of the story, but
 15 sometimes that doesn't happen in the courtroom. Sometimes the
 16 State is the only one that puts on evidence, and they don't put
 17 on any evidence. Do you think you could make a decision
 18 without them putting on any evidence or would you want to hear
 19 their evidence?

20 A. I'd want to hear their evidence.

21 Q. Okay. So you would want to hear from maybe not just
 22 the defendant, because of the Fifth Amendment, but you'd expect
 23 them to put on some evidence?

24 A. Yes.

25 Q. Okay. What if the law says they don't have to put on

1 evidence, would it be something that you could follow or would
 2 you think that, you know, I still want to hear everything.
 3 Judge, you know, I want to hear what they have to say?

4 A. If it's the law, then I wouldn't have to hear it. If
 5 it's the law then I wouldn't hear it.

6 Q. Okay.

7 A. No.

8 Q. What do you think about the concept of beyond a
 9 reasonable doubt? What does that mean to you?

10 A. Beyond a reasonable doubt. Hearing all the evidence
 11 and before you find him guilty.

12 Q. But it just says how much evidence you have to hear.
 13 You have to hear evidence beyond a reasonable doubt. We have
 14 to prove the case beyond a reasonable doubt. What does that
 15 mean to you?

16 A. That you have to provide the evidence, enough
 17 evidence. I don't understand.

18 Q. The question is enough, how much is enough.
 19 Sometimes people say, "Well, look, you know, I couldn't find
 20 him guilty and I couldn't give the death penalty on a case this
 21 serious unless you prove everything to me beyond all doubt,
 22 beyond, you know, 100 percent." Is that what kind of evidence
 23 -- how much evidence you would have to hear in this case before
 24 you can make a decision?

25 MR. JONES: Your Honor, that's not a fair

1 reasonable doubt. It's not 100 percent, okay, because -- the
 2 only way it could be 100 percent is if you were there and saw
 3 it, right?

4 VENIREPERSON NO. 88: That's right.

5 THE COURT: Well, if you were there and saw
 6 it, they'd be calling you as a witness. You'd actually be
 7 disqualified from being on the jury because you saw it happen.
 8 And we want people on the jury that can be fair and impartial,
 9 not witnesses. Do you follow me?

10 VENIREPERSON NO. 88: Yes.

11 THE COURT: And what he's asking is, can you
 12 hold him to that burden or would you require him to prove a
 13 higher burden than the law requires or a lower burden than the
 14 law requires?

15 VENIREPERSON NO. 88: No, I can hold him to
 16 that burden.

17 THE COURT: All right.

18 MR. SKURKA: Judge, I don't have any other
 19 questions all right. Any questions?

20 MR. JONES: Yes.

21 THE COURT: Okay.

22 VOIR DIRE EXAMINATION

23 BY MR. JONES:

24 Q. Let's see. Where do we start? Tell me a little bit.

25 You work for the City of Corpus Christi?

1 question. She's never suggested that. The standard of proof
 2 in a criminal case is beyond a reasonable doubt.

3 MR. SKURKA: Judge, I'm allowed to explore --

4 MR. JONES: Unless he's trying to bait her
 5 into saying 100 percent.

6 THE COURT: Look, here's the thing. We need
 7 to know that you're gonna hold them to beyond a reasonable
 8 doubt. That's what the law says. And we need to know if
 9 you're gonna hold them to a higher standard or a lower
 10 standard than the law requires, or beyond a reasonable doubt
 11 what the law requires. That's what he's really asking. Do
 12 you follow my questions?

13 VENIREPERSON NO. 88: So I have to hear 100
 14 percent of his?

15 MR. JONES: No.

16 THE COURT: No. Okay. Let's go back over
 17 this. Remember I told you there's no definition of reasonable
 18 doubt, okay? There's preponderance of the evidence. That's
 19 51 percent, remember?

20 VENIREPERSON NO. 88: Yes.

21 THE COURT: There's clear and convincing.
 22 That's when they try to take away your child. That's a higher
 23 burden, right?

24 VENIREPERSON NO. 88: Okay.

25 THE COURT: Higher than that is beyond a

1 A. Yes, sir.

2 Q. And you're in the recreation department?

3 A. Parks and Recreation Department.

4 Q. Tell me exactly what your duties are there.

5 A. I'm an area supervisor for latchkey so I watch over
 6 five of the latchkey sites.

7 Q. Okay. And what is your degree in college?

8 A. Kinesiology, sports management.

9 Q. Okay. Did you do sports -- you must have done sports
 10 in high school, right?

11 A. Yes.

12 Q. What sports did you like?

13 A. Volleyball, basketball, and soccer.

14 Q. Soccer. Okay. And did you play -- did you play
 15 soccer in college?

16 A. Yes.

17 Q. Okay. You're 23 years old?

18 A. Yes.

19 Q. It looks like you've got a good job at your age with
 20 your credentials. That's excellent. Is this your first time
 21 being on a jury?

22 A. Yes, sir.

23 Q. Okay. The -- in Texas we have the death penalty as a
 24 form of punishment for certain offenses. The judge told you
 25 what they are. All of them involve murder and all of them

1 involve murder, plus some aggravating circumstance. There are
2 two -- there's two forms of punishment that are available in a
3 death penalty or a capital murder case, life and death.

4 MR. GARZA: Judge, can we have a hearing
5 outside the presence of the witness?

6 THE COURT: Why don't you wait in the jury
7 room. We'll be right with you.

8 (Venireperson exits courtroom.)

9 MR. SKURKA: Judge, the State will exercise a
10 peremptory strike.

11 THE COURT: Okay. Let's bring her back in.

12 (Venireperson enters the courtroom.)

13 THE COURT: All right. Ms. Reyes, you were
14 not selected to be on this jury. We do appreciate your time
15 in coming down here and doing your service to this community.

16 Thank you very much.

17 VENIREPERSON NO. 88: Thank you.

18 THE COURT: If you need a work excuse, we can
19 get one for you.

20 VENIREPERSON NO. 88: I have one. Thanks.

21 (Venireperson exits courtroom.)

22 MR. JONES: Is that number 7 or 8 for them?

23 THE COURT: That's what I was trying to figure
24 out. Okay. Who do we have up next?

25 THE BAILIFF: Mr. Lyles.

1 selection? Okay. Let's see here. All right. You have been
2 been on a murder for hire case?

3 A. Yes, sir.

4 Q. And that was a capital murder then?

5 A. Yes, sir.

6 Q. So you know all this stuff I'm about to go over.

7 A. Maybe. I don't know.

8 Q. I think you do. I'm gonna run through it relatively
9 quickly with you since I think you already know what we're
10 doing here.

11 All right. First of all, you know that the
12 State has the burden of proof in every criminal case?

13 A. Yes, sir.

14 Q. You know that the burden is beyond a reasonable
15 doubt; you've applied that before?

16 A. Yes, sir.

17 Q. All right. It's not beyond all doubt, but it's the
18 highest standard we have in the law?

19 A. I understand.

20 Q. You can follow that law?

21 A. Yes, sir.

22 Q. You also know that the defendant is innocent until
23 proven guilty?

24 A. Yes, sir.

25 Q. Can you follow that?

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1 THE COURT: Mr. Lyles. I don't have his deal.
2 Let me go get it.

3 All right. Bring him in.

4
5 VENIREPERSON NO. 90,
6 DALE STEPHEN LYLES,
7 VOIR DIRE EXAMINATION

8 BY THE COURT:

9 Q. All right. Come on up and have a seat. All righty.

10 You are Mr. Lyles; is that correct?

11 A. Yes, sir.

12 Q. All right. Mr. Lyles, as you probably know, we are
13 trying to select a capital murder jury, and so that's what
14 we're in the process of. We're looking for people that can
15 keep an open mind and people that can follow the law.

16 A. Yes, sir.

17 Q. So let's begin with part one. Can you keep an open
18 mind in this case?

19 A. Yes, sir, I think I can.

20 Q. All right. You have not heard anything about the
21 case?

22 A. No.

23 Q. Other than what you've heard in this --

24 A. Yeah.

25 Q. -- preliminary -- the preliminary part of the jury

1 A. Yes, sir.

2 Q. All right. And you know that the defendant doesn't
3 have to testify?

4 A. Correct.

5 Q. And the jury can't hold it against him if he chooses
6 not to?

7 A. No, sir.

8 Q. And you'd follow that law?

9 A. Yes, sir.

10 Q. All right. Next thing, you know that there are
11 certain kinds of crimes that are capital murders and certain
12 murders that aren't?

13 A. Yes, sir.

14 Q. All right. One of them being murder for hire.

15 A. Yes, sir.

16 Q. You say you gave him 45 years. Did they try that as
17 a capital murder?

18 A. Yes, sir.

19 Q. Okay. Was he found guilty of a lesser included?

20 A. I'm not sure exactly what that is. He was --

21 Q. I mean, was he found guilty of just regular murder
22 instead, or was he found guilty of capital?

23 A. I'm not sure, to be honest. I really don't know.

24 Q. We'll get to that.

25 A. I don't remember.

1 Q. Well, murder for hire is one of those things that can
 2 be a capital murder, okay?

3 A. Okay.

4 Q. There's others like murdering a child under the age
 5 of six, murdering a policeman while in the course of his duty,
 6 a fireman. There's a laundry list.

7 A. Yes, sir.

8 Q. This particular case is capital murder. Why?

9 Because the legislature says if you put robbery and murder
 10 together, that's capital, okay?

11 A. Yes, sir.

12 Q. Now, what's robbery? Well, if I pulled a gun to you,
 13 you give me your wallet, that's a robbery. The forcible taking
 14 of property from another or by force or by threats, okay?

15 A. Okay.

16 Q. What if I do that same thing and instead of giving me
 17 the wallet, you punch me in the face, and down I go. I don't
 18 get your wallet. I didn't rob you, but I attempted to. The
 19 State can get there either way on this, all right? They're
 20 alleging that this defendant on a given day in Nueces County,
 21 Texas, committed the offense of robbery or attempted robbery;
 22 and in the course of doing so, committed murder --

23 A. Yes, sir.

24 Q. -- all right? And the law says they got to prove all
 25 their elements, and you know this because you've done this

1 Q. Well, in that case you knew that there was the guilt
 2 or innocence phase, that is, did the person do it, can they
 3 prove it beyond a reasonable doubt?

4 A. Yes, sir.

5 Q. And so you've been to the second phase. In the
 6 second phase that's a first degree felony. That's five to 99
 7 or life and up to a \$10,000 fine, right?

8 A. Yes, sir.

9 Q. Okay. And then you guys went back there and you
 10 deliberated, and you came up with this 45-year sentence?

11 A. Yes, sir.

12 Q. Capital murder is a little different, all right?

13 First part of the trial is just like that case. You deliberate
 14 on guilt or innocence; and if the defense's found not guilty,
 15 it's over with. If he's found not guilty, you don't put down
 16 life or death because those are the only possibilities. You
 17 answer questions, okay?

18 A. Yes, sir.

19 Q. Let's talk about the question. Here's the first one.
 20 "Is there a probability that the defendant would commit
 21 criminal acts of violence that would constitute a continuing
 22 threat to society?" What does that mean? Is it probably true
 23 that the defendant will be violent with people in the future?

24 A. Yes, sir.

25 Q. Okay. The jury would answer that yes or no.

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1 before?

2 A. Yes, sir.

3 Q. Would you make them prove all their elements before
 4 you found the defendant guilty of capital murder?

5 A. Yes.

6 Q. All right. Now, in capital murder cases, if
 7 defendant's found guilty there's two possibilities, life or
 8 death.

9 A. Yes, sir.

10 Q. All right. How long ago was this trial that you sat
 11 on?

12 A. Two years ago. Mr. Skurka did it.

13 Q. Okay. Did you come in for individual jury selection?

14 A. No, sir. We did not do individual jury. It was --

15 Q. Okay. Then maybe what it was is they didn't seek the
 16 death penalty?

17 MR. SKURKA: It was attempted capital murder,
 18 Judge.

19 THE COURT: Oh, okay. It was.

20 MR. SKURKA: It wasn't a completed one.

21 A. No. Yes, sir.

22 Q. So then what happens there because it's an attempted
 23 capital murder, it lowers it a degree to first degree, and so
 24 that's why you assessed --

25 A. Yes, sir.

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1 A. Yes, sir.

2 Q. Second question. "After taking into consideration
 3 all of the evidence, including the circumstances of the offense
 4 --" that's the first part of the trial -- -- the defendant's
 5 character and background --" Well, what's character? What
 6 kind of guy was he? Is honest, truthful, has he been a good
 7 guy the rest of his life? Is he a person of good character?
 8 All right. And background. What's that? His childhood.
 9 Maybe it was bad. Maybe it was good. His background. What
 10 about his criminal history? That kind of thing, all right?

11 A. Yes, sir.

12 Q. And the personal moral culpability of the defendant.
 13 That's a little harder. It's a little harder to conceptualize
 14 that but I've got an example for you, okay?

15 A. Uh-huh.

16 Q. Two defendants?

17 A. Yes, sir.

18 Q. Two burglaries. One burglar he likes hookers and
 19 cocaine, and he breaks into this house and he trashes the
 20 place. He pulls out every drawer, he just makes a complete
 21 mess, takes everything of value, breaks things, just a bad
 22 deal. He sells it and he uses the money on hookers and
 23 cocaine.

24 A. Yes, sir.

25 Q. Second guy, also guilty of burglary, and he's been at

1 his job for 20 years. He has lost it because of layoffs. No
 2 fault of his own. He's got three kids, and they're hungry, and
 3 he can't provide.

4 A. Yes, sir.

5 Q. And he – they haven't eaten in three days, and he
 6 goes into a home through an unlocked home and takes nothing but
 7 food. And he hasn't eaten in three days either, but he doesn't
 8 eat because he wants the kids to fill their bellies.

9 A. Yes, sir.

10 Q. All right. Are the two people -- do they have the
 11 same personal moral culpability?

12 A. No, sir, I don't think so.

13 Q. They do not. That's what that's talking about, okay?
 14 That's what that's talking about.

15 A. Yes, sir.

16 Q. All right. Now, after considering all of those
 17 things, is there sufficient mitigating circumstance or
 18 circumstances to warrant a sentence of life imprisonment rather
 19 than the death sentence be imposed? All right. This is like a
 20 global question. This is take into consideration everything in
 21 the trial. Now, I don't know what happened in this case that
 22 you sat on, but on the second phase of the trial you probably
 23 know from experience that you hear more than just did the
 24 person do it or not. You hear about the person's background,
 25 is this their first offense; you know, what kind of a person is

1 may say, "That doesn't mean anything to me, and I'm not gonna
 2 consider it as a mitigating circumstance." But in any event,
 3 you go through this process, and you say, Is there enough to
 4 warrant a life sentence rather than death, okay?

5 Now, at the beginning of every trial -- and, of
 6 course, you know this, too -- I do the oath, right?

7 A. Yes, sir.

8 Q. "Do you solemnly swear that you will render a true
 9 verdict based upon the evidence and law presented to you?" And
 10 all the jurors, they raise their right hand, and they say, yes,
 11 and then they put on their little tags, right?

12 A. Yes, sir.

13 Q. There's people that come in here and they can't take
 14 that oath in this case. Why? Because they cannot consider the
 15 death sentence. They will not vote that way. They will not
 16 participate in the process. Other people they say, "I can give
 17 them a fair trial in the first part, but if we find him guilty,
 18 this law of yours means nothing to me. I'm gonna rig it so he
 19 gets the death penalty every time. I'm not even gonna consider
 20 all this stuff." Neither of those people can take the oath in
 21 this case. My question to you is, can you take the oath and
 22 follow the law in this case?

23 A. Yes, sir, I think I can.

24 THE COURT: All right, Mr. Skurka.

25 MR. SKURKA: Thank you, Judge.

1 he? Capital murder, you might even hear more than you would in
 2 a case like that. And you've got to take into consideration
 3 everything that's admitted into evidence.

4 A. Yes, sir.

5 Q. The whole trial, from start to finish. Like maybe --
 6 I'm just giving you an example -- maybe he's a war hero. Maybe
 7 he fought in Desert Storm, and he saved 20 soldiers from
 8 getting killed, and they gave him the Congressional Medal of
 9 Honor. Maybe he teaches children that can't read to read, you
 10 know. And you may think those are -- those are mitigating
 11 circumstances. And you may think that is sufficient enough to
 12 give him also life sentence.

13 A. Yes, sir.

14 Q. Okay? Is it an excuse for the crime or not? Well,
 15 you found him guilty. He's gonna be -- he's found guilty and
 16 he's gonna be punished. Not an excuse for the crime. Maybe
 17 you find out he's been abused as a child, and his father used
 18 to beat him up, sexually molest him, okay? Is it an excuse for
 19 the crime? No. But can it be taken into consideration here?
 20 Absolutely. All right? And these lawyers will try and tell
 21 you what they think mitigating or aggravating circumstances
 22 are; mitigating, of course, meaning to lessen and aggravating
 23 you mean to ratch it up. But only the jury decides. One
 24 person may say, 'Well, he was an Eagle Scout. That's a
 25 mitigating circumstance in my heart, in my mind.' Another one

1 VOIR DIRE EXAMINATION

2 BY MR. SKURKA:

3 Q. Hi, Mr. Lyles.

4 A. Hello.

5 Q. You never thought you'd be back here again so soon,
 6 huh?
 7 A. No, sir, I didn't.
 8 Q. And just to refresh my memory, I think that was the
 9 case where there was two people -- there was a man and a woman.
 10 And were you on the case with the man defendant or the female
 11 defendant?

12 A. The man.

13 Q. Okay. Because I tried the -- there was actually two
 14 codefendants. We tried the female first.

15 A. Yes, sir.

16 Q. And then we tried the man. Now, that case was a
 17 little bit different because that was kind of a sting
 18 operation --

19 A. Yes, sir.

20 Q. -- where a person wanted to hire somebody to kill
 21 somebody, but thank God it never happened. Nobody got killed
 22 on the case. But you know a little bit about the background,
 23 so I want to kind of sail through some of these things.

24 A. Okay.

25 Q. But as the judge said, it's a little different. Back

1 then you had a case where you still had to decide guilt or
2 innocence first?

3 A. Yes, sir.

4 Q. And in the second phase was you had to decide what
5 punishment. But if I remember correctly, you had like a
6 minimum of five years, a maximum of 99 years, and you just
7 picked a number between those?

8 A. Correct.

9 Q. Here, it's going to be a little bit different because
10 you don't just pick a number, and you don't just say death or
11 life in prison. You have some special issues that we have to
12 answer. The first thing -- part of that I want to talk to you
13 about is the mere fact it's a death penalty case. In this
14 case, it is a death penalty case. How do you feel about the
15 death penalty in general?

16 A. I mean, it's by the State and all, and I understand
17 what it means, I mean, somebody will be executed. It depends
18 upon the circumstances, I guess, it depends upon what happens
19 during the case. I do not have a problem with it, no, but it
20 depends upon the case.

21 Q. When you say depends upon the case, I think what
22 you're really saying it depends on what the evidence is?

23 A. What the evidence is, I'm sorry, yes, sir.

24 Q. Because every case is different.

25 A. Yes, sir.

1 A. It's not guilty.

2 Q. That's exactly right. Okay. Let's talk about some
3 more things. How did you feel about it when you heard it was
4 that kind of case? Do you remember that day when you came in
5 the jury room and all those people were there?

6 A. Yes, sir.

7 Q. What's the first reaction you had?

8 A. Different, just have never been on one before, have
9 seen it, you know, heard about it, all the trials and all.
10 Didn't understand that it took two things, as the judge just
11 said. I thought if you killed somebody, you could have the
12 death penalty, but it's two things together that prove that you
13 could have the death penalty.

14 Q. Be even eligible for it?

15 A. Yeah, be eligible. I didn't understand that until he
16 explained that that day.

17 Q. And what you said, Mr. Lyles, is what a lot of people
18 think. It's nothing against lay people, but, you know, they
19 don't work in the law enough.

20 A. Yes, sir.

21 Q. And people come up to me all the time and say, "Hey,
22 he murdered somebody; why didn't he get the death penalty?" I
23 say, No, the law says only certain of those cases that he
24 murdered somebody –

25 A. Yes, sir.

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1 Q. And I know we're talking semantics, but really,
2 you're depending on what the evidence is. And the law says
3 this. If the evidence is such that you think the question
4 should be answered and he gets the death penalty, can you
5 follow through with that?

6 A. Yes, sir, I can.

7 Q. And I'm gonna turn it around and say if the evidence
8 is such that you think he should get a life sentence, can you
9 do that too?

10 A. Yes, sir. I don't have a problem either way.

11 Q. Okay. That's what I'm trying to figure out. Are you
12 leaning one way or the other?

13 A. Not -- no, sir.

14 Q. The law also says that the State has to prove the
15 case beyond a reasonable doubt. You learned that a couple of
16 years ago when you were in that case and just because a
17 person's charged with a crime doesn't mean he's guilty of the
18 crime, correct?

19 A. Correct.

20 Q. You have to hold the state to the burden, and it's
21 the burden of proof we have in every criminal case. So it's
22 nothing more special because it's a capital murder case, but
23 make no mistake, we have to prove the case beyond a reasonable
24 doubt. If we don't prove beyond a reasonable doubt, what's
25 your duty to do?

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1 Q. – special cases, like murder plus something else.
2 Other people -- and do you think that's a pretty good scheme
3 where the State says, "Look, not every murder case is going to
4 be the death penalty. Only these certain cases even qualify
5 for it."

6 A. Yes, sir. It seems like a checkpoint in the law that
7 that you can do that.

8 Q. And that's exactly right, because it's kind of like
9 we have checks and balances. Not every case is gonna be this;
10 not every case is going to be that. You have to wait to hear
11 all the evidence, but it's only certain cases even qualify for
12 the grand jury -- qualify for that type of case. In this case,
13 it's because it's murder plus a robbery. And that just
14 basically means you murder somebody while you're committing or
15 attempting to commit robbery. It doesn't have to be a
16 finalized robbery or a complete robbery. You can just be
17 trying the robbery. As long as you're using force or threats
18 of force to take something, that's enough to prove robbery.
19 And the murder would be part of that too. It would have to be
20 connected with the thing.

21 And that's probably pretty fair in our scheme of
22 things too; it's not like you just want to rush into anything
23 too; correct?

24 A. Yes, sir.

25 Q. And the law says you don't. What you do in the first

1 part of the case is you hear what the person did that day, you
 2 know, is he guilty of the crime, did he murder and rob
 3 somebody, and then maybe the surrounding circumstances. Then
 4 you may go -- if you find him guilty, you go to the second part
 5 of the trial, and then you might get to hear some background
 6 evidence. The background would be like, you know, does he have
 7 good character or bad character? Has he been to prison ten
 8 times before? Has he never been to prison before? I don't
 9 know what it is, and I can't tell you what it is in this case.
 10 But then instead of going back there and voting off death or
 11 life, you answer two questions. I want to go through them with
 12 you because it's a little different from your last trial.

13 Look at Special Issue No. 1. Now, that's
 14 presupposing that you found him guilty, you heard evidence, and
 15 now you're ready to make a decision. The judge asks you to
 16 answer these questions. "Is there a probability that the
 17 defendant would commit criminal acts of violence that would
 18 constitute a continuing threat to society?" Some key words in
 19 there I want you to focus on is the first line is probability.
 20 It doesn't say certainty. Unless you've got a crystal ball,
 21 and you can see what's gonna happen in the future, then the law
 22 doesn't require me to prove for sure what's gonna happen.

23 A. Yes, sir.

24 Q. The second part says, "the defendant would commit
 25 criminal acts of violence," which is kind of broad, right?

1 can't hurt anybody." Well, I always have to remind them what
 2 -- who else is in a prison with the prisoner? Tell me.

3 A. People who have been found guilty.

4 Q. Right, other prisoners. Who else?

5 A. Other prisoners and --

6 Q. And guards?

7 A. -- guards, people who are there to protect other
 8 people supposedly.

9 Q. Yeah, and people that work in the prison, you know,
 10 the warden, the maintenance people, the people who feed them
 11 and stuff. So it's not like you're out on a desert island and
 12 there's no one around that you can hurt. I guess what I'm
 13 trying to point out is prison is still part of society.

14 A. Yes, sir.

15 Q. So you still interact with people?

16 A. I understand that.

17 Q. Have you ever heard of that happen to people like --

18 A. Prison riot.

19 Q. Prison riot or a guard getting hurt or prisoners
 20 hurting other prisoners?

21 A. Yes, sir.

22 Q. So it's not just the fact that you've locked somebody
 23 up in prison that's gonna keep them from hurting anybody,
 24 right? There's still that possibility. And that's all that
 25 the judge is asking. Is it probable, more likely than not,

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 1 A. Yes, sir.
 2 Q. Sometimes people tell me, Well, Mark, I can't give
 3 him the death penalty unless I think he's actually gonna go out
 4 and murder somebody again or commit capital murder. But the
 5 law doesn't say that. It just says criminal acts of violence.
 6 So it could be, I don't know, assault, breaking into somebody's
 7 house, some kind of violent act.

8 And the last phrase says, "that would constitute

9 a continuing threat to society." What does that mean to you, a
 10 continuing threat to society?
 11 A. It means a perpetual, keep doing it over and over
 12 again.
 13 Q. Well, there's a possibility that they keep doing it
 14 again.

15 A. Possibility, that's right.

16 Q. You don't know for sure, but sometimes you can kind

17 of tell what a person's going to do in the future by what
 18 they've done in the past.
 19 A. Yes, sir.
 20 Q. Now, that's not 100 percent. You've heard of people
 21 changing or rehabilitating themselves, but it's a kind of a
 22 good guideline. And the key part in there I want to talk to
 23 you about is society. Some people say, they say, "Well, why
 24 does the DA's office seeking the death penalty? Why don't you
 25 just lock them up in prison, give them a life sentence, and he

11 A. Yes, sir.

12 Q. And it went from five years to 99 years or life. My
 13 guess is the legislature makes it that big a range of
 14 punishment because that's 90 years -- 95 years difference. It
 15 makes it a difference because why? If it's a really, really
 16 bad case, you can go up the highest 99 years or life. If it's
 17 not that bad, you go down to the lowest. If it's somewhere in
 18 the middle, you go somewhere in the middle. In other words, it
 19 gives the power to jury to punish what they think is
 20 appropriate in that case --

21 A. Yes, sir.

22 Q. -- under those circumstances. That's kind of what
 23 that question does. It's a little different. But bear with me
 24 on this.

25 A. Okay.

1 Q. Because what that question says, are there any
 2 mitigating circumstances? That's the key word, "mitigating."
 3 Mitigating basically means anything that would lessen or make
 4 less severe the punishment. This key word. Anything that
 5 would lessen or make less severe the punishment or anything
 6 that reduces the defendant's moral blameworthiness. In other
 7 words, he did the crime. He's guilty. Yes, I think he's a
 8 continuing threat to society, but we're back to that checks and
 9 balances. Before you give him the death penalty, the judge is
 10 gonna tell you to take into consideration all of the evidence,
 11 including what happened that day, the circumstances surrounding
 12 that, his character and background, good character, bad
 13 character, whatever, and his personal moral culpability. Is
 14 there sufficient -- is it enough of a mitigating circumstance
 15 or circumstances to warrant that a sentence of life rather than
 16 the death sentence be imposed? In other words, I kind of
 17 believe that you don't want to rush into things.

18 A. Yes, sir.

19 Q. You think he's a criminal that's got a violent -- he
 20 could commit violence in the future, but is there any other
 21 extenuating circumstances or anything that would choose that
 22 would make you lower the sentence? It's kind of the opposite
 23 of aggravating circumstances. You know, you have -- and what a
 24 mitigating circumstance is up to the jury to decide. The judge
 25 is not gonna say, okay, this is a mitigating circumstance, this

1 I think it's pretty good in our government that
 2 we have checks and balances because you don't want people to
 3 say automatically death penalty, automatically life sentence.
 4 You've got to be open-minded. Can you be open-minded, consider
 5 everything?

6 A. Yes, sir.

7 Q. Are you leaning one way or the other right now?

8 A. No, sir.

9 Q. And it's kind of like a blank slate. The only way
 10 you should be leaning right now is that he's innocent because
 11 right now the State hasn't proven any evidence, right?

12 A. Right.

13 Q. That's what we call the presumption of innocence. It
 14 doesn't mean he is innocent. It just means right now he's
 15 presumed innocent because we brought no evidence against him.

16 One last part of the law I want to talk to you
 17 about is mitigating circumstances. There's another part in the
 18 law that talks about intoxication. Voluntary intoxication is
 19 not a defense to crime. Voluntary intoxication. If you go get
 20 yourself drunk or high on drugs, can you go in to court and
 21 say, "I'm not guilty, I was drunk when I did that crime?" You
 22 can't do that. That's not an excuse to the crime. If you go
 23 rob a bank, can you say, "Well, I'm sorry, I was drunk at the
 24 time, so you have to excuse me from robbing the bank." No, the
 25 law says you can't do that. The law does say that's a possible

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1 is a mitigating circumstance, this is a mitigating
 2 circumstance. You might hear evidence that are possible
 3 mitigating circumstances. Well, you know, he was an orphan.
 4 He didn't have -- he didn't come from a good home, or, you
 5 know, he was an honor student in school, made straight As on
 6 the honor roll, or he was a war hero or something like that.
 7 Or, you may hear that he was a bad guy, been to prison ten
 8 times before. You see what I'm saying?

9 A. Yes, sir.

10 Q. It's not automatic that just because he -- you answer
 11 that question yes, that he's automatically going to get the
 12 death penalty. The judge says look at the whole picture.

13 A. Yes, sir.

14 Q. What happened that day, what happened in the past.
 15 Is there enough to lower the sentence? If there is, you think
 16 there's sufficient mitigating circumstance, it lowers it to
 17 life. If you don't think there's enough, then he gets the
 18 death penalty. But the jury kind of has to balance that,
 19 because some people may say, "Well, look, you know, I don't
 20 care if he got an award -- an award in the war, a medal in the
 21 war. I don't care if he, you know, was an orphan, you know,
 22 he's still got to pay for what he did." Other people may say,
 23 "Well, you know, we should give this guy a break because he was
 24 a war hero or, you know, he came from a broken home." It's up
 25 to the jury to decide, and you have to weigh everything.

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1 mitigating circumstance. In other words, some people may look
 2 at it and say, "Well, you know, he robbed a bank; he was drunk
 3 when he did it, so maybe we'll give him a lower sentence."
 4 Other people may say, "I don't care if he was drunk or not, you
 5 know, he shouldn't be robbing banks." See, before you hear the
 6 evidence, it's hard to make a decision. That's why the judge
 7 is so careful about saying wait till you hear everything before
 8 you decide. And can you do that?

9 A. Yes, sir.

10 Q. That's the most important thing. And the fact that
 11 you were on a jury in another case, is that gonna affect you in
 12 this case?

13 A. No, sir. I think --

14 Q. It's different --

15 A. I think it would help me, I mean, just to understand
 16 what -- no surprises. I know what's gonna happen, I know what
 17 we're gonna go through, and we wait on the evidence. See what
 18 happens.

19 Q. But you know the legal procedure more than a lot of
 20 other people?

21 A. Yeah.

22 Q. But the question is just because I've done this
 23 before with you, is that gonna have an effect?

24 A. No, sir.

25 Q. You know, it's almost like comparing apples and

1 oranges.

2 A. Yes, sir.

3 Q. Just because you voted one way in one case, does that
4 mean you're gonna vote one way -- the same way in the other
5 case?

6 A. No, sir.

7 Q. Okay. You're not leaning toward guilty or innocent?

8 A. No, sir.

9 Q. And you're not leaning toward death or life?

10 A. No, sir.

11 Q. Okay. Clean slate --

12 A. Yes, sir.

13 Q. -- so to speak. Okay. I need to ask you a few
14 questions about your -- on your questionnaire.

15 A. Okay.

16 Q. And I don't mean to pry, but I've got to talk to you
17 about this deal with your son having a problem with drugs. I
18 know you probably think that --

19 A. I figured it was gonna come up.

20 Q. You figured we were gonna talk about it.

21 A. Yeah.

22 Q. Well, I'm sorry, but, you know, it's just one of
23 these things we have to talk about.

24 A. No, I understand. I put it down. I understand.

25 Q. Can you tell me a little bit about what happened and

1 A. Yes, sir.

2 Q. The law agrees with you. It's not an excuse to the
3 crime, but can you see that certain times in a person under the
4 influence of drugs or alcohol may get a lesser sentence because
5 of that?

6 A. Yes, sir, I can see it.

7 Q. You know like, say, for example, we were talking
8 about, I think the judge is talking about the burglars and how
9 different they are. I mean, what if you had a person charged
10 with drugs, using drugs the first time, he's a first time
11 offender, that guy might get probation --

12 A. Yeah.

13 Q. -- whereas if you caught a drug dealer who, you know,
14 had a pound of cocaine and was selling it to people, you might
15 treat him a little harsher.

16 A. Yes, sir.

17 Q. So, just the fact that a person under the influence
18 of drugs or alcohol, it could be a mitigating circumstance to
19 lower the sentence; it may not?

20 A. It could be; yes sir.

21 Q. And based on your own experience, you can see that?

22 A. Yes, sir. I can see it for sure.

23 Q. I mean, I'm sure that -- I mean, a parent can punish
24 their kid horribly and say, I don't want to ever have you as a
25 son, disown you, kick them out of the house. But there's some

1 what's going on?

2 A. He got messed up with the wrong people and got on
3 some drugs. And I want to say we lost him for about six
4 months, and we finally got him in the right situation, got him
5 cleaned up. And he's been sober and straight for about two and
6 a half, three years now.

7 Q. Good. So he's kind of responded to the treatment?

8 A. Yes, sir. And we kept him in a good environment, and
9 he's very good. He's doing very good right now.

10 Q. Was there -- would he ever have charges brought
11 against him?

12 A. No, sir.

13 Q. Was it kind of a personal --

14 A. No, sir. It was close. It was close several times,
15 but no.

16 Q. Okay. What do you think about people that use drugs
17 or alcohol as an excuse to their behavior?

18 A. You did it to yourself. You put it in your body,
19 whether it be drinking or drugs or whatever. And you have to
20 pay for the consequences on your -- what you do, but, I mean, I
21 understand that under the influence, you may do things that
22 you're not accustomed to. And he did. From my standpoint,
23 that's the way I see that end.

24 Q. Well, that kind of goes in what we were just talking
25 about the law.

1 mitigating circumstances in there, so you try to work with
2 them.

3 A. My family went through a lot of rough times. My wife
4 and I did.

5 Q. Yeah, but at least I think you're in a good position
6 to talk to jurors about how -- not to talk to jurors -- to be
7 on the jury to say, yeah, I can give that some consideration.
8 And it could be any kind of mitigating circumstances.

9 A. Yes, sir.

10 Q. Intoxication?

11 A. Yes, sir.

12 Q. Come from a broken home, whatever, but you have to
13 really consider those things.

14 A. Yes, sir.

15 Q. And just like you had to consider your own kid
16 because, you know, we've had parents before, you know, they
17 call it tough love. And they -- they're very tough?

18 A. Yes, sir.

19 Q. But you can see where there could be mitigating
20 circumstances --

21 A. Very much so.

22 Q. -- that make it up?

23 A. Very much so.

24 Q. Well, that sounds fair enough.

25 You also said in your questionnaire something

1 about -- when the judge asked you do you have any questions,
 2 you said, "No, just some gray areas." Did we clear those up
 3 for you or do you have any other questions about that?

4 A. Yeah. The thing about during the robbery if you kill
 5 somebody, I never understood that's the law, I guess, is what
 6 you're saying, nor about things in the law, what creates the
 7 circumstance for the death penalty and all.

8 Q. That was one of your deals --

9 A. Yeah.

10 Q. -- where you thought about every murder case might
 11 get it?

12 A. Yes, sir. Yes, sir, I did.

13 Q. Well, the bottom line, do you think you can be fair
 14 in this case?

15 A. Yes, sir, I think I can.

16 Q. Would you listen to all the evidence before you make
 17 a decision?

18 A. Yes, sir.

19 Q. And once the decision is made, can you carry through
 20 with it?

21 A. Yeah. Yes, sir. I don't have a problem with that.

22 Q. You know that he doesn't have to prove anything?

23 A. Yes, sir.

24 Q. They can put on evidence if they want. They don't
 25 have to. And you can't hold that against them if they don't.

1 him?

2 A. No, sir.

3 Q. You presume him innocent. If know if you had to vote
 4 right now, that's how you'd have to vote, innocent --

5 A. Yes, sir.

6 Q. -- because I have not proved anything.

7 A. Yes, sir.

8 Q. And remember the presumption just means you presume
 9 him innocent. It doesn't mean he is innocent. Everybody
 10 starts their trial with their presumption of innocence.

11 A. Correct.

12 Q. This is America. That's a fair way to do it. If
 13 were you on trial, you don't want to be, you know, presumed
 14 guilty and then have to prove your innocence. The State has to
 15 prove the case against you.

16 A. Yes, sir.

17 Q. Okay. Any questions I can answer for you?

18 A. No, sir.

19 MR. SKURKA: Okay. Thank you, Mr. Lyles.
 20 I'll let the defense lawyers talk to you.

21 VOIR DIRE EXAMINATION

22 BY MR. JONES:

23 Q. Let's see, I'd like to first ask you about your
 24 occupation. You're a teacher?

25 A. I'm a teacher. I'm a PE coach.

1 A. Correct.

2 Q. Do you remember that?

3 A. Yes, sir.

4 Q. And the defendant may testify. He may not testify.

5 I don't know what he's gonna do. That's up to him and his
 6 lawyers, but I can guarantee you if says he's not gonna
 7 testify, the judge is gonna tell the folks on this jury, you
 8 can't hold that against him.

9 A. Yes, sir.

10 Q. Can you follow that law too?

11 A. Yes, sir.

12 Q. The fact that he's been charged with this crime, does
 13 that mean that he's guilty?

14 A. No, sir.

15 Q. Who makes that decision?

16 A. The evidence and you.

17 Q. Well, the evidence and the jury.

18 A. Yes, sir. I'm sorry.

19 Q. I don't make the decision.

20 A. I know. I'm sorry.

21 Q. That's okay. But you understand you have to wait
 22 till all that?

23 A. Yes, sir.

24 Q. So just because he's indicted doesn't mean he's
 25 guilty. If he doesn't testify, you won't hold that against

1 Q. Where?

2 A. A PE coach at Calk Elementary.

3 Q. Oh, okay. And so how long have you been doing that?

4 A. Ten years.

5 Q. Wow, okay.

6 A. I had a business before then and have a degree in
 7 marketing.

8 Q. And that's a big --

9 A. Tell me about it.

10 Q. -- big change?

11 A. Second career. Third career.

12 Q. Second career. Okay. I've heard about second
 13 careers. So what was it that motivated you to go into
 14 teaching?

15 A. My wife told me to get a job. No.

16 Q. Okay.

17 A. No, I had sold my business after 15 years.

18 Q. Yes.

19 A. And I played Mr. Mom for a couple of years.

20 Q. Yes.

21 A. And my wife's a school teacher.

22 Q. Oh, okay.

23 A. And so we have the summers off, and we travel.

24 Q. That's a good plan.

25 A. And I love to play golf so.

1 Q. Let's see, you've got kids --
 2 A. Twenty-four and 21.
 3 Q. Okay. So they're out of the nest?
 4 A. Yes, sir.
 5 Q. Okay. Now, as far as -- did you have to go back to
 6 school to do this --
 7 A. No, sir.
 8 Q. -- the --
 9 A. No. You can get certified and get your certificate.
 10 I already have a degree so --
 11 Q. Okay. You already had your degree. Okay. But your
 12 primary duties are in athletics?
 13 A. Yes, sir. Well, dealing with kids, kindergarten to
 14 fifth grade.
 15 Q. All right.
 16 A. I see 450 kids every day.
 17 Q. Oh, my goodness. All right. So you -- all right.
 18 You've been doing this for ten years?
 19 A. Yes, sir.
 20 Q. Okay. And I presume that in your work, that you meet
 21 all kinds of children?
 22 A. Yes, sir.
 23 Q. From all kinds of families?
 24 A. Yes, sir. Broken homes, everything.
 25 Q. Everything. Okay. And you deal with those problems

1 A. Yes, sir.
 2 Q. Now, why do you suppose that the legislature created
 3 a range of punishment for that particular kind of offense?
 4 A. Just because every case is different and it depends
 5 upon the circumstances, you know, somebody could be a good
 6 citizens. As you say, mitigating circumstances is what it
 7 amounts to.
 8 Q. So that was gonna be my next question.
 9 A. Yeah.
 10 Q. Would it be fair to say that in that case, since the
 11 jury did not give the man a life sentence, there must -- you
 12 must have heard something in the case which made you feel like
 13 that the sentence you gave was a just one?
 14 A. Yes. Between the jurors, we -- I want to say we
 15 discussed it for almost a day on the various ranges, and we
 16 went from there.
 17 Q. In that case, did the defense -- after the man was
 18 found guilty, did you-all hear evidence on the punishment phase
 19 of the case?
 20 A. Yes, sir.
 21 Q. Did the defendant put on evidence?
 22 A. Yes, sir. We heard from several of his people, if
 23 that's what you're asking, yeah.
 24 Q. Right, family members?
 25 A. Yes, sir.

1 directly?
 2 A. Yes, sir, unfortunately sometimes.
 3 Q. And I'm sure the school has an elaborate, I guess, --
 4 I want to say plans or they've got ways of dealing with various
 5 problems, right?
 6 A. Yes, sir. We have counselors on campus.
 7 Q. Counselors?
 8 A. All of us are trained to do several things. We take
 9 additional training in dealing with the kids from counseling
 10 to, you know, how -- mentoring, that type of thing, and stuff
 11 like that.
 12 Q. Let me ask you about your jury service. How long ago
 13 was it?
 14 A. I want to say a year and a half.
 15 Q. Okay.
 16 A. Something like that.
 17 Q. Now, is attempted capital murder, if -- that's a
 18 first degree felony, right?
 19 A. I'm not sure. I don't know.
 20 Q. Well, did you-all assess -- the jury assess
 21 punishment in this case?
 22 A. Yes, sir. We gave him -- I think it was 45 years.
 23 Q. What was the range of punishment; do you remember?
 24 A. Five to 95 -- or 99 to life.
 25 Q. Ninety-nine or life. It was a first degree felony?

1 Q. So you got to learn a little bit more about --
 2 A. -- about the individual.
 3 Q. -- about the individual? In your -- in your
 4 deliberations, did you discuss the evidence you heard at the
 5 punishment stage?
 6 A. Yes, sir.
 7 Q. Did that figure into your final decision?
 8 A. Yes, sir, it did.
 9 Q. Okay. You also discussed the offense itself?
 10 A. Yes, sir.
 11 Q. What happened, in other words, so the -- well, you
 12 probably already experienced -- the procedure that you went
 13 through applies in this kind of case also.
 14 A. Yes, sir.
 15 Q. Okay? We just dress it up with some fancy language,
 16 okay? In Texas, three things have to occur before a person can
 17 get the death penalty. Keep in mind there's only two
 18 punishments for capital murder. What are they?
 19 A. The death penalty and life imprisonment.
 20 Q. Life imprisonment. The first condition is the person
 21 has to be found guilty of the crime, right?
 22 A. Correct.
 23 Q. If the person is found guilty, then the case moves
 24 into the second phase, which deals with the problem of
 25 punishment. The jury can hear additional evidence. There are

1 different rules of evidence. And at some point the evidence
 2 will close and the jury will retire to answer these two special
 3 issues.

4 Condition number 2 is the jury must find off to
 5 your, let's see, left hand there --

6 A. Yes, sir.

7 Q. -- that the answer to Special Issue No. 1 is yes.

8 A. Yes, sir.

9 Q. How many votes do you think it takes to get a yes
 10 answer there?

11 A. I don't know. I guess it depends upon the jury.

12 Q. Well, no --

13 A. Are you talking about me personally?

14 Q. No, just generally, the rules require what type --
 15 you were told in that other case you were on -- that your
 16 verdict had to be unanimous?

17 A. Yes, sir. That's correct.

18 Q. Okay. So that applies here. Before --

19 A. It has to be unanimous is what you're saying?

20 Q. Yes.

21 A. Okay. I'm sorry. That's what I thought you --

22 Q. All 12. And that's an individual decision --

23 A. That's correct.

24 Q. -- not a democratic decision.

25 Now, the rules are changed just a little bit in

1 it off to your right hand there, sir?

2 A. Yes, sir.

3 Q. And would you read it to yourself and tell me when
 4 you're finished.

5 A. (Venerperson complies.) Okay.

6 Q. Is there any word or phrase in that question that you
 7 do not understand?

8 A. No, sir.

9 Q. Okay. Now, you have probably already lived through
 10 the thought process that this question asks you to engage in,
 11 okay?

12 A. Yes, sir.

13 Q. So -- but I want to make sure that we understand the
 14 words.

15 A. Okay.

16 Q. The question is asking you, is there any mitigating
 17 circumstance. What does the word "to mitigate" mean?

18 A. Extraordinary or you know, whatever, just anything
 19 out of the ordinary, mitigating anything that doesn't have to
 20 do with the circumstance.

21 Q. That's not what it means. That's a word that's not
 22 normally used in our daily conversations. It's a lawyer word.

23 A. I would agree with that.

24 Q. It means to lessen.

25 A. Okay.

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1 this kind of case.

2 A. Okay.

3 Q. Let's say that 10 people vote no and two people vote
 4 yes. Ordinarily, that would create a hung jury, but under the
 5 rules in this type of case, 10 votes for no, which would be
 6 favorable to the defendant, you can get a verdict -- a verdict.

7 A. Okay.

8 Q. You would be instructed that if the answer to the
 9 first issue is no, you'll stop deliberations, and the verdict
 10 of the Court. And what punishment would the judge assess?

11 A. I would imagine he goes free.

12 Q. No, no. He doesn't go free.

13 A. I don't understand.

14 Q. What punishment would he get if the answer --

15 A. Life in prison, I guess.

16 Q. That's right. And I say the judge assesses the
 17 punishment. Actually, the punishment is already predetermined

18 --

19 A. Because of -- okay.

20 Q. But you're permitted to know the effect of your
 21 answers, so that's what I'm talking about.

22 A. Okay.

23 Q. So let's say that the jury in our discussion finds
 24 the answer to issue No. 1 yes, then you're instructed to go on
 25 to the special -- the second Special Issue. Would you look at

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1 Q. And in the context of a criminal case, it means a
 2 fact which if you believe to be true would cause you to want to
 3 vote for a lesser punishment. So in your case that you tried
 4 earlier, there were probably some facts which you believed to
 5 be true which caused you to vote for something less than a life
 6 sentence. I don't need to know what those facts are. But
 7 obviously, that was the case, right?

8 A. Yes.

9 Q. Because you hit a sentence right in the middle. So
 10 this question is asking you, are there any facts, mitigating
 11 circumstances, that would cause you to believe that a life
 12 sentence is more just than a death penalty in this case, okay?

13 Now, the question goes a step further in the top part of the
 14 question. It asks you to think about certain things to
 15 consider. The verb "to consider" means to think about, okay?
 16 And in the context of a criminal case it's asking you to think
 17 about certain things with a view toward doing something,
 18 namely, voting for life or death.

19 Okay. The first thing it tells you, you can
 20 consider the facts and circumstances of the offense.

21 A. Yes, sir.

22 Q. You've already found the defendant guilty. You had
 23 all the details about how the offense was committed, etc.
 24 Okay. You can -- the law says you can think about that.

25 A. Uh-huh.

1 Q. Then it says, "the defendant's character and
2 background." What is character mean? If I say that you were a
3 person of good character, what do I mean?

4 A. That -- high moral values, understand, I mean, right
5 from wrong.

6 Q. Okay. You -- do you agree that our society has a set
7 of moral values that we normally agree are the measure of good
8 conduct?

9 A. Yes, sir. That's why we have laws too.

10 Q. We have laws. We have the Ten Commandments. We have
11 the Boy Scout Law. Those values are stated in those documents.

12 A. Yes, sir.

13 Q. Okay. If you say a person has good character, that
14 means that he generally adheres to that --

15 A. To those laws, yes.

16 Q. What about background, well, that's pretty easy.
17 That's a person's history, his biography, right?

18 A. Yes, sir.

19 Q. And so you can probably expect in a case like this
20 that you're gonna hear some evidence about background if we get
21 that far?

22 A. Yes, sir.

23 Q. Okay. And all -- all the law requires is that you
24 take that information and consider it with a view toward you
25 might use it to justify voting for a life sentence rather than

1 know that.

2 Q. Sure. It's a group decision.

3 A. And we discussed it and between the 12 of us we
4 decided that.

5 Q. All right. Now let's -- I'm gonna suggest to you how
6 to think about --

7 A. Okay.

8 Q. -- moral culpability. First of all, you start -- do
9 you believe in the doctrine of good will -- free will?

10 A. Yes, sir. It's up to you.

11 Q. In other words, we, as human beings, have the power,
12 if you will, to choose alternate courses of action?

13 A. Yes, sir.

14 Q. Okay. And, of course, we'd want to make the right
15 decisions. So "moral" suggest that there is a code out there,
16 a set of rules that we learned from the day we were born?

17 A. Yes, sir.

18 Q. Your children, where do they learn their moral values
19 from?

20 A. From their parents.

21 Q. From their parents, from their teachers.

22 A. Yes, sir.

23 Q. From church, from Boy Scout leaders, from
24 grandparents, next door neighbors, in other words, adult peers.

25 A youngster picks up -- at some point learns what the rules

1 a death sentence, okay?

2 A. Yes, sir.

3 Q. All right. The next one says, "And the defendant's
4 personal moral culpability." What does moral culpability mean?
5 Now, let's say before you try to answer the question, that you
6 what it is, and I want to say if you can articulate it.

7 A. Well, I think I know, apparently I don't because the
8 lawyer words are what you said.

9 Q. Sometimes people can know something and not be able
10 to --

11 A. Articulate.

12 Q. -- articulate what they know.

13 A. Yes.

14 Q. But I know that you know the answer to this, but I
15 want you to try to tell me in words.

16 A. He's morally capable of doing it. To me, that's what
17 it is.

18 Q. Let's go back to the case of your previous jury
19 experience. The jury in your case voted a 45-year sentence.
20 Would it be fair to say that the defendant in that case had a
21 reduced moral culpability because if he had -- if -- if he was
22 fully morally culpable, you would have given him a life
23 sentence?

24 A. Correct, yes. You know, when you're in the jury
25 room, you know, when you're sitting, it's done as a jury. You

1 are.

2 A. Yes, sir.

3 Q. Okay. So the first question is -- when you're trying
4 to judge moral culpability -- is what are the rules and does
5 the defendant know what they are?

6 A. Okay.

7 Q. Did he have the opportunity to learn them, okay?

8 A. Okay.

9 Q. Is there anything in his past that would have
10 interfered with his learning what the rules were, okay? At the
11 time of the alleged conduct, did he -- was he fully aware of
12 what we expect adults to be aware of about the rules of moral
13 conduct, okay?

14 Now, the next question is, at the time that he
15 engaged in the conduct, is there any fact out there that would
16 relate to his exercise of his judgment? Is there anything
17 interfering with his judgment about whether to take this course
18 or that course, okay?

19 A. Yes, sir.

20 Q. Now, let's see. I don't know who gave the -- I think
21 the judge gave the hypothetical. You have two people
22 committing a similar crime, a crime of theft. One is stealing
23 to enrich himself. The other is stealing to feed his starving
24 children, okay? Well, obviously, if you're a judge in a case
25 like that, you're gonna give the guy for stealing to feed his

1 children probably a lesser punishment?
 2 A. Yes, sir.
 3 Q. Why?
 4 A. Because he's doing it for his family.
 5 Q. Okay. That -- looking at his starving children and
 6 facing his duty to take care of them is interfering with his
 7 judgment, right?
 8 A. Yes, sir.
 9 Q. It's directing his judgment, actually. So that would
 10 be a mitigating circumstance.
 11 A. Yes, sir.
 12 Q. Okay. Whereas the other guy -- the other person in
 13 the hypothetical there ain't -- it's hard to rationalize.
 14 A. Yes, sir.
 15 Q. Okay. Sometimes we have -- well, you understand. In
 16 other words, do we know the rules at the time in question? Was
 17 there anything going on in the life of the defendant which
 18 would interfere -- for example, if a person has a mental
 19 illness, or if the person has a diminished IQ, he's borderline
 20 retarded, or intoxication, although intoxication depends on the
 21 circumstances.
 22 A. Yes, sir.
 23 Q. In your own experience your son probably did some
 24 things that he never would have done while he was sober, right?
 25 A. Yes, sir.

1 to an impartial jury.
 2 A. Yes, sir.
 3 Q. An impartial juror is one who comes to the task with
 4 an open mind, with no prejudgments, and who doesn't lean toward
 5 one side or the other.
 6 A. Yes, sir.
 7 Q. That's biases. Is there anything -- do you know of
 8 any reason why we could not assume that you would be a fair and
 9 impartial juror in this case?
 10 A. No, sir.
 11 Q. Do you think you can be fair?
 12 A. Yes, sir.
 13 Q. Okay. Come in --
 14 A. With a clean slate --
 15 Q. -- with a clean slate?
 16 A. -- as he said.
 17 Q. A clean slate, and just tell me what you got, and
 18 I'll tell you whether you got know.
 19 A. Yes, sir.
 20 Q. Beyond a reasonable doubt is the standard of proof.
 21 It's the highest degree of certainty required in a legal case
 22 in a Texas court.
 23 A. Yes, sir.
 24 Q. Why do you think the legislature assigns beyond a
 25 reasonable doubt on criminal cases?

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1 Q. So that alcohol was -- or whatever he was taking was
 2 interfering with his judgment. And -- so, do you think -- does
 3 that --
 4 A. I understand what you're saying, yes, sir.
 5 Q. Well, that's it. That's basically it. Now, the law
 6 requires -- we don't have an option about these things. The
 7 Supreme Court of the United States directs defendants --
 8 defense attorneys to investigate discovery and to prove up the
 9 defendant's background, okay? Or, to offer any evidence which
 10 might relate to his moral culpability. For example, if I were
 11 representing a defendant who had a diminished mental ability,
 12 like he was borderline retarded, I'd prove that up.
 13 A. Yes, sir.
 14 Q. Because that affects his ability to make judgments.
 15 A. Yes, sir.
 16 Q. Or even to know what the rules are in the first
 17 place, okay? Or if I'm representing a client that had -- that
 18 came up in a deprived background, like some of the kids that
 19 you -- that you teach --
 20 A. Yes, sir.
 21 Q. -- I would have to prove that up because that might
 22 affect his knowledge of the value system and his ability to
 23 make correct judgments.
 24 Okay. All right. The -- real quickly -- and
 25 I'm almost finished -- the right to trial by jury is the right

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1 A. To make sure that the person -- I mean, you have to
 2 prove it.
 3 Q. Okay.
 4 A. You have to prove it.
 5 Q. What's at risk -- what's at stake in a criminal case?
 6 A. You go to jail or not.
 7 Q. Loss of --
 8 A. Lawsuits --
 9 Q. Loss of liberties?
 10 A. Liberties, correct.
 11 Q. It could be loss of your life or your property,
 12 correct?
 13 A. Yes, sir.
 14 Q. In this American civilization of ours, what do we
 15 value most highly?
 16 A. Life.
 17 Q. Liberty and the pursuit of happiness, right? So,
 18 therefore, before the government can take those things away, we
 19 need to be sure, strong evidence. And there's a good reason to
 20 do so. We don't want to be too easy with that, okay? Do you
 21 agree with that?
 22 A. Yes, sir.
 23 Q. Okay. And if you -- at the end of the case, if the
 24 State hadn't proven their case to your satisfaction, you need
 25 to return a verdict of what?

1 A. Not guilty.

2 Q. Not guilty. Are these --

3 A. Or --

4 Q. If they don't, you know, if they don't prove that
5 he's a continuing threat to society, then you resolve that
6 doubt in favor of the defendant, and you vote in favor of him?

7 A. Yes, sir.

8 Q. Now, let me give you one illustration, and then I'm
9 gonna stop --

10 A. Okay.

11 Q. -- of beyond a reasonable doubt. I didn't think this
12 story up, but I got it from somebody else. Let's say you have
13 a box, and it's one of these file boxes we've got here. Down
14 at the bottom of the box there's a little two-inch hole cut in
15 the side of it where it sits on the floor. At the end of the
16 box you put a mouse. And all of a sudden in the box you put a
17 hungry cat. He likes to eat mice. Put the top on the box, and
18 you come back an hour later; you open the box, and the cat's
19 still in the box, but the mouse is gone. Did the cat eat the
20 mouse or did the mouse escape?

21 A. You don't know.

22 Q. Because you don't have enough information, right?

23 A. No, sir, you do not.

24 Q. So that -- that illustrates the problem that a jury
25 has in a criminal case.

1 MR. JONES: We're gonna accept this juror.
2 THE COURT: All right. Bring him in. That
3 would be No. 10?

4 MR. SKURKA: 10.

5 (Venireperson enters courtroom.)

6 THE COURT: All right. Mr. Lyles, you have
7 been accepted on this jury, okay?

8 VENIREPERSON NO. 90: Yes, sir.

9 THE COURT: I know I told you this already,
10 but I want to reiterate, don't read the local section. Don't
11 watch the local news until this case is over with.

12 VENIREPERSON NO. 90: Yes, sir.

13 THE COURT: If somebody tries to talk to you
14 about the facts of the case, say, "I can't talk to you. After
15 the trial's over maybe I'll talk to you, but right now I'm not
16 going to do it."

17 VENIREPERSON NO. 90: Yes, sir.

18 THE COURT: Okay?

19 VENIREPERSON NO. 90: Yes, sir.

20 THE COURT: We believe this case is going to
21 begin December 1st. We'll give you a call just to confirm
22 that with you.

23 VENIREPERSON NO. 90: Okay.

24 THE COURT: All right. You might want to
25 figure on blocking off that week for sure; maybe the next

1 A. Yes, sir.

2 Q. At the end of the case is the government -- has the
3 State given me enough evidence to convince me to this high
4 level of certainty so that I can make a decision? And if they
5 haven't, well, then, the law says you have to vote in favor of
6 the defendant.

7 A. Yes, sir.

8 Q. Okay. Do you agree with that?

9 A. Yes, sir.

10 MR. JONES: Okay. I have no further
11 questions.

12 THE COURT: Anything else?

13 MR. SKURKA: We have no other questions,
14 Judge.

15 THE COURT: All right. Mr. Lyles, will you
16 wait in the jury room for a moment while I speak with the
17 lawyers?

18 VENIREPERSON NO. 90: Yes, sir.

19 (Venireperson exits courtroom.)

20 THE COURT: All right. What says the State?

21 MR. SKURKA: Judge, we'll accept the juror.

22 THE COURT: All right.

23 MR. JONES: Can we confer?

24 THE COURT: Yes, sir.

25 (Counsel conferring.)

1 week.

2 VENIREPERSON NO. 90: Okay.

3 THE COURT: Okay?

4 VENIREPERSON NO. 90: Yes, sir.

5 THE COURT: All right, Mr. Lyles. And if you
6 need a work excuse, the bailiff can get that for you.

7 All right. Thank you, Mr. Lyles.

8 (Juror No. 10 exits courtroom.)

9 THE COURT: No. 10. Why don't we do this. I
10 guess let's tell No. 94 and 96 to come back at 1:00. We'll
11 bring in 92. Why don't you tell them and bring in 92 and
12 we'll work till noon.

13 (Venireperson enters courtroom.)

14

15 VENIREPERSON NO. 92,

16 JOSEFA TREVINO,

17 VOIR DIRE EXAMINATION

18 BY THE COURT:

19 Q. Okay. You are Josefa Trevino; is that right?

20 A. Yes, sir.

21 Q. All right. We're trying to pick a capital murder
22 jury. You know that?

23 A. Uh-huh.

24 Q. That's why you're here. We're running a little bit

25 behind. But Ms. Trevino, this is a serious case so we're

1 giving it the time it needs, okay?

2 A. Yes, sir.

3 Q. That's, of course, why we're doing it individually,
4 one at a time. Okay. Let's see. All right. You have been on
5 a criminal case before?

6 A. Yes, sir, with you.

7 Q. Which case was that?

8 A. Forgery. I don't remember the name of the person.

9 MR. SKURKA: I'm sorry. I can't hear her,
10 Judge.

11 THE COURT: It was in this courtroom. She was
12 in a forgery case here.

13 MR. SKURKA: Do you mind moving the microphone
14 a little closer to you?

15 MR. JONES: What's the statistical possibility
16 of that?

17 Q. (BY THE COURT) How long was the trial?

18 A. Two days.

19 Q. Okay. Okay. Well, then you know a lot of this
20 stuff. If it was -- first of all, can you keep an open mind in
21 this case?

22 A. Yes, sir.

23 Q. Okay. Because some people can't, you know. They
24 say, "Well, I heard something in the news and it's already
25 done." But if you can, that's fine. That's what we're looking

1 Q. Okay. Could you do that?

2 A. Yes, sir.

3 Q. All right. Okay. Now, let's see, I'm trying to
4 remember this case that we did. Do you -- do you remember much
5 of the facts?

6 A. Female. It had a company. She wrote a check of
7 those Discover card checks that they sent to a person, and then
8 she went to a tire place.

9 Q. Okay, yeah. That was Marroquin.

10 A. Marroquin, that's right.

11 Q. Delma Marroquin.

12 MR. SKURKA: She went to a what place?

13 THE COURT: She went to a tire place.

14 MR. SKURKA: A tire place.

15 Q. (BY THE COURT) It was Delma Marroquin?

16 A. Yes, sir.

17 MR. SKURKA: It was Delma Marroquin?

18 THE COURT: Yes, sir.

19 MR. SKURKA: I remember that case.

20 THE COURT: Yes, sir.

21 Q. (BY THE COURT) Now look, remember that case,
22 defendant -- defendant was acquitted in that case, as I recall?

23 A. Yes, sir.

24 Q. Okay. Now, you may have thought she was guilty, I
25 don't know, but the State didn't prove their evidence beyond a

1 for, okay?

2 A. Okay.

3 Q. All right. You've been in a criminal case before and
4 it wasn't that long ago, so you know the State's got the burden
5 of proof, okay? The State brings the charges. The law says,
6 State, you bring the charges, well, then you've got to prove
7 them, okay?

8 A. Yes, sir.

9 Q. Defense has no burden. And because of that, the
10 defendant is innocent until proven guilty.

11 A. Yes, sir.

12 Q. You can follow that law?

13 A. Yes, sir.

14 Q. All right. Then you also know the burden of proof is
15 beyond a reasonable doubt?

16 A. Yes, sir.

17 Q. The highest burden we have. And you already --
18 you've already gone through this before. Okay. Next thing,
19 the law says since -- it really makes sense because the
20 defendant doesn't have a burden of proof. The law says, all
21 right, look, they got no burden of proof, he doesn't have to
22 testify. He doesn't have to testify, and you can't make him.
23 And more than that, the jury can't even consider it against
24 him?

25 A. Right.

1 reasonable doubt, right?

2 A. Correct.

3 Q. Okay. That's -- that's the burden here. I had a
4 juror just this weekend tell me, you know -- it was a
5 completely different trial than yours -- and he said, "You
6 know, we thought he did it, but we didn't think the State
7 proved their case beyond a reasonable doubt." And that's --
8 and that juror did exactly the right thing. You don't think
9 they proved it beyond a reasonable doubt, that's fine. It's
10 not innocent versus guilty. It's not guilty versus guilty,
11 okay?

12 A. Yes, sir.

13 Q. And you understand that concept?

14 A. Yes, sir.

15 Q. All right. Now, in that case, you know, of course,
16 that we have two parts of the trial because you've been in a
17 trial before. There's the guilt or innocence phase and then
18 there's the punishment phase. Now, you didn't get to the
19 punishment phase --

20 A. Correct.

21 Q. -- because if the defendant's found not guilty, you
22 don't get there. But we've got to talk about what if we get
23 there in this case. We don't know if we're going to get there,
24 but we still got to talk to you about it, okay?

25 So the first part, guilty or not guilty. All

1 right. Second part, punishment. This is a capital murder.
 2 What's that? Well, it's murder, obviously, the intentional
 3 taking of the life of another. But it's murder plus, murder
 4 plus something else. In this case, murder plus robbery or
 5 attempted robbery. That's the allegation, okay?

6 What's robbery? Well, let's say I pull a gun on
 7 you, and I say, "Give me your money." And you say, "okay,"
 8 then you give me your purse. I robbed you. Because I
 9 threatened you — or I could have done it by force. But, you
 10 know, I can either threaten or use force to take something from
 11 you, okay? It's a robbery.

12 All right. Let's move along. What if I did the
 13 exact same thing, but it wasn't a purse you were holding; it
 14 was a bowling ball, you know, a carrying case, and you had a
 15 bowling ball and you well over and hit me over the head and
 16 knocked me out; am I guilty of robbery? No, but I'm guilty of
 17 attempted robbery. And the reason I bring this up is the State
 18 has alleged that this defendant committed the act of robbery or
 19 attempted to do so, and in the course of doing so, killed
 20 somebody. All right. That's right. That's what they have to
 21 prove. All right?

22 So, it's murder plus, murder plus the robbery.
 23 Two crimes. And, of course, you know from your prior service
 24 that the State has to prove elements. They have to prove all
 25 the elements. Would you require them to prove all the elements

1 childhood. Was it a good one, was it a bad one? Did he get
 2 abused as a child? You consider it, okay?

3 Third thing, his personal moral culpability.
 4 All right. That is legalese written by a lawyer. But let me
 5 tell you what it is. Let me give you an example.

6 Two people get convicted of burglary. One
 7 person breaks into a house, just ransacks the place, just tears
 8 the place apart. Takes everything of value, TVs, VCRs, CD
 9 players, video games, wife's jewelry, everything, sells it, and
 10 he spends it on hookers and cocaine, okay?

11 The second guy gets convicted of burglary. He's
 12 been working at his job 20 years get laid off through no fault
 13 of his own. The economy's bad. They lay him off. Times are
 14 hard. They run out of money. Eventually, his three kids don't
 15 have anything to eat. They haven't eaten in a couple of days.
 16 He goes into somebody's house. He doesn't break in. He just
 17 goes through an unlocked door. He takes food, he goes back,
 18 feeds the kids, okay? He's starving himself, but he doesn't
 19 eat. He wants to make sure the children really get their fill.
 20 Now, they're both guilty of burglary, right, but is their
 21 personal moral culpability the same?

22 A. No.

23 Q. It is not. It is not, okay? That's what that's
 24 talking about, personal, moral culpability.

25 A. Okay.

146 1 of capital murder before you found someone guilty?

2 A. Yes, sir.

3 Q. All right. Next thing, in that case I think -- I
 4 don't know if you were even going to do the punishment, should
 5 you have found the person guilty. In any event, in this case
 6 if you find -- if you get on this jury, and if the defendant's
 7 found guilty, you will be asked to do punishment. Two
 8 possibilities: life imprisonment or death, both serious
 9 things, okay? You don't say number of years. It's life or
 10 death. But you don't say life or death. You answer questions,
 11 and here's one of them.

12 "Is there a probability that the defendant would
 13 commit criminal acts of violence that would constitute a
 14 continuing threat to society?" What does that mean? Well, is
 15 it probably -- probably, more likely than not, 51 percent, that
 16 the defendant would be violent with people in the future, okay?

17 A. Okay.

18 Q. All right. The jury answers yes or no. The second
 19 issue, "After taking into consideration all the evidence,
 20 including the circumstances of the offense --" that's the first
 21 part of the trial, guilt or innocence -- "the defendant's
 22 character and background --" what's that? Well, character,
 23 what kind of guy is he? Is he an honest guy? Is he a
 24 trustworthy guy? Has he been a great guy other than this
 25 incident, okay? Background. What's that? Well, his

148 1 Q. All right. After considering all this, is there
 2 sufficient mitigating circumstance or circumstances that
 3 warrant a sentence of life imprisonment rather than the death
 4 sentence be imposed? Okay, what's that mean? What is a
 5 mitigating circumstance? Well, mitigating means to lessen,
 6 okay? Mitigating circumstance. Let's say I told you --
 7 because one of the things you're gonna hear about is his
 8 background. Let's say I told you he was in Desert Storm, and
 9 he risked his own life in Desert Storm to save the lives of 20
 10 soldiers, okay? And he got the Congressional Medal of Honor.
 11 You might say that is a mitigating circumstance. That's
 12 something in his favor. That's something good about him, okay?

13 A. Okay.

14 Q. Maybe he was an Eagle Scout. Maybe he used to teach
 15 little kids to read that wouldn't otherwise ever learn, okay?
 16 Mitigating circumstances, maybe if you feel like that's a
 17 mitigating circumstance, okay? These lawyers will suggest to
 18 you, I believe, during the trial, what a mitigating
 19 circumstance is. Only the jury gets to decide. In other
 20 words, you may say the fact that he saved all those 20
 21 soldiers, that's a mitigating circumstance to me. The next
 22 person may say, no, not to me, okay?

23 Now, does that mean that he is excused from the
 24 criminal activity? No, you already found him guilty. It
 25 doesn't excuse him for the crime. What this question's asking

1 is take into consideration his whole life. Is there mitigating
 2 circumstances, first of all, all right? And then are they
 3 sufficient to warrant life imprisonment? Because you might
 4 say, you know the fact that he saved those 20 soldiers, it was
 5 a mitigating circumstance. I'm putting that on his side of the
 6 balance sheet, but it's not sufficient to warrant life rather
 7 than death, or maybe it is. Or maybe it in connection with all
 8 of the other mitigating circumstances versus the aggravating
 9 circumstances, the bad things about him, warrants life rather
 10 than death. That's only for the jury to decide, okay?

11 A. Okay.

12 Q. And you know this, because when I started that trial,
 13 do you remember when I raised my right hand, and you raised
 14 your right hand, and you took an oath to render a true verdict
 15 based upon the law and evidence presented to you?

16 A. Yes, sir.

17 Q. Right? And then you-all put on your tags?

18 A. Yes, sir.

19 Q. Okay. I need to know if you can do that in this
 20 case. And before you answer, let me stop you. Some people
 21 tell me, you know, they say, "Well, I could sit on that forgery
 22 case, but I can't sit on this one, and I can't take that oath
 23 because I can't participate in the process that leads to
 24 someone's death." Flip side. They say, "I'll give them a fair
 25 trial on the first part, but if we find him guilty of capital

1 feel, okay?

2 A. Okay.

3 Q. It's important to tell jurors that it's okay to say
 4 how you feel even if it's not what you think that we want to
 5 hear. Does that make sense?

6 A. Yes.

7 Q. Because these are some hard decisions, and we need to
 8 explore with you, can you really sit on this type of jury. In
 9 other words, it's okay for you to not sit on this jury, just as
 10 much as it is okay for you to sit on this jury. Let me give
 11 you an example. Remember that I kind of gave a corny example
 12 the other day because I'm a big Dallas Cowboy fan, remember?
 13 And I said, what if a guy comes up in a Washington Redskins
 14 uniform. I'm sitting on the jury and they bring in the
 15 defendant. That's the defendant, you know. I say, I hate the
 16 Redskins. I'm automatically going to vote against him. I'm
 17 already gonna think he's guilty. Well, I might be okay on some
 18 other kind of jury, but I certainly wouldn't be good on that
 19 kind of jury, right, because I'm already biased or prejudice?
 20 And so it would be my duty to tell the judge, "Look, I can't be
 21 fair in this case. He's a Redskin." But the Cowboys did beat
 22 the Redskins, if you didn't know that.

23 A. Yes, I knew that.

24 Q. You did know that. Well, I just wanted to make sure
 25 because everybody should know that. Okay. I know that's kind

1 murder, your law means nothing to me, I'm gonna answer these
 2 questions, make sure he gets the death penalty, and I will not
 3 consider these issues." Those two people cannot follow the
 4 law. And if they feel that way, it's okay; it's just not fair
 5 to get on this jury. So I need to know from you, can you
 6 follow the law?

7 A. Yes, sir.

8 THE COURT: All right. Mr. Skurka.

9 VOIR DIRE EXAMINATION

10 BY MR. SKURKA:

11 Q. Hi, ma'am. My name is Mark Skurka. I'm an assistant
 12 district attorney along with Mr. Schimmel here. We'll be
 13 presenting the case to you on this jury, if you're selected on
 14 the jury. Today we're gonna talk to you about, in a little
 15 more detail, on what the judge went into. Some of it is going
 16 to be a little repetitious, but we kind of just need to go over
 17 it a little bit more to make sure everybody's on the same page
 18 as far as qualifying you as a juror. I can start off by
 19 telling you there's no right or wrong answers to anything you
 20 say. We just want to know how you feel about this case -- or
 21 feel about some issues in this case. I don't want you to
 22 answer in such a way that you say, "Well, I better say it this
 23 way because that's probably what the judge wants me to say," or
 24 "I better answer this way because that's the way the defense or
 25 the State wants me to answer." We just want to know how you

1 of a silly example, but it really makes sense, right? If you
 2 can't do it, you can't. If you can, you can. That's fine.
 3 And the first question I want to talk to you about is the death
 4 penalty because there's no doubt that's an important issue in
 5 this case. Remember that first day when I came in there and I
 6 told you, I said, "Look, the State of Texas has decided that
 7 we're gonna seek the death penalty against this guy right
 8 here." I want you to look at him and tell me, do you think you
 9 could participate in that kind of case?

10 A. Yes, sir.

11 Q. Why?

12 A. I need to see evidence and to detail, I need -- you
 13 know, I'm sorry, but it is your burden to prove it and --

14 Q. Well, you don't have to apologize. That's my burden
 15 in every case.

16 A. Right. So that's the type of person I am.

17 Q. The reason -- you see what I'm saying though because
 18 I know if you saw some other people around there that first
 19 day. Remember there was 200 or 300 people in there, and the
 20 judge came down and said, "Folks, this is a criminal case
 21 you're gonna serve on." And everybody looks at him and says,
 22 Maybe it's a shoplifting case or DWI case. And then the judge
 23 says, "It's not just that. It's going to be a capital murder
 24 case. You, if you're picked on this jury, may have to serve on
 25 that jury and make a decision on life or death." What was your

1 first reaction when you heard it was that kind of case?

2 A. It's just weird because I've never served a jury on
3 that, and it's just something greater than what I've served. I
4 didn't really judge or anything in that fact, but it was just
5 different.

6 Q. Okay. Well, I'm not really asking if you judged. I
7 just thought -- do you know what I'm talking about? Did you
8 see people they were going like, "Oh, my gosh, I can't believe
9 it's that kind of case." And some people were affected by it
10 and some were not. I was just kind of curious to know how it
11 affected you when you heard it was this type of case?

12 A. Not to where it affected me to where I'm like
13 panicking or anything.

14 Q. And I guess I said the word "freaking out." That
15 sounds a little bad. But there's people who are very honest
16 and they come up to us and they'll say, "Look, Judge, you know,
17 because of my religious beliefs or because of my moral beliefs,
18 or just because I can't handle making that kind of decision,
19 matter what it is, I can't sit on that type of trial." And if
20 they say that, that's fine, you know, we're not gonna argue
21 with them. We just need to know if they're qualified. And I
22 just want to kind of know what your reaction to that is.

23 A. I don't have to where it's -- you know, I'm -- it's
24 gonna affect me, and like you're saying, you know, with the
25 religious, no, it doesn't matter to me.

1 saying the wrong word, but it's just I want to know more as to
2 what can contribute to giving him the death sentence.

3 Q. Okay. Let me say it again, okay? You may or may not
4 hear about his background. You may not hear that he's got a
5 prior violent history. You said in your statement here on the
6 questionnaire, "Death penalty is okay, but only if he's proved
7 to be a violent person and has a violent history."

8 What I'm saying is, the law says you can give
9 the death penalty even though he doesn't have a history or a
10 violent history. Maybe he never even got a traffic ticket
11 before. Would you require or would you want him to have a
12 violent history or the State to prove that before you could
13 vote for the death penalty? In other words, his past, his
14 background, his violence?

15 A. I do.

16 Q. You do -- you would require that?

17 A. Yes, sir.

18 Q. Okay. Because, you know -- I'm -- I can't commit you
19 to how you're gonna vote right now, but there's a part of the
20 law that says the State can rely just on the first part of the
21 trial. Remember the judge said this first part and the second
22 part of the trial? The State can just rely on the first part
23 of the trial, the facts and circumstances of the offense. And
24 you don't have to have any other additional evidence or past
25 violent history. So you're saying you would have a hard time

1 Q. I just use that as an example. It could be anything.

2 A. But, no, I'm okay with it.

3 Q. Some people just say, "I can't make that decision.
4 Only God makes that decision."

5 A. Right.

6 Q. Some people say, "Well, I have my own feelings on
7 that."

8 A. Right.

9 Q. So that's not gonna interfere with you sitting on
10 this jury?

11 A. No, sir.

12 Q. You said that in your questionnaire too, about "I
13 could give the death penalty only if it's shown that he has a
14 violent history." Do you remember when you wrote that in your
15 questionnaire?

16 A. Yes, sir.

17 Q. The law in Texas doesn't require a person to have
18 prior offenses in order to get the death penalty. In other
19 words, you can make the decision based on just the case itself.
20 He may never have a criminal history. Maybe he doesn't even
21 have a traffic ticket. Would that affect you or would that --
22 would you want to have more before you make that kind of
23 decision on whether he gets the death penalty or not?

24 A. I do think so because automatically, I mean, I don't
25 think he should -- it has to be weighed, you know. Maybe I'm

1 following that law; you would require a violent history?

2 A. Yes, sir.

3 Q. Or evidence of a violent history?

4 A. Yes, sir.

5 Q. Okay. And that's okay if you do. We just want to
6 know because --

7 MR. SKURKA: Okay. That's all the questions I
8 have.

9 MR. JONES: Your Honor, I --

10 THE COURT: Do you have questions you can ask
11 her.

12 MR. JONES: Yeah.

13 THE COURT: If you want to take something out
14 of the presence, we can.

15 MR. JONES: Okay. Maybe I can clarify because
16 I was gonna object to his question because I don't think it
17 was a fair question.

18 THE COURT: Well you can ask questions.

19 VOIR DIRE EXAMINATION

20 BY MR. JONES:

21 Q. Tell me again. You said in your questionnaire if you
22 voted for the death penalty, you would be motivated to do so if
23 the defendant had a violent history, --

24 A. Yes, sir.

25 Q. -- right? Are you saying that you would never vote

1 for the death penalty? Actually, you don't vote for the death
 2 penalty, okay? The jury answers two Special Issues. Let's
 3 talk about the special issues. The first one is off to your
 4 left, okay? If the jury finds the defendant guilty of the
 5 offense charged, capital murder, then the case goes into its
 6 second phase, which is the punishment phase of the trial, and
 7 the jury will hear new evidence that's relevant to these two
 8 questions, okay? And in order to be a qualified juror in this
 9 case, you have to tell the Court that you will honestly answer
 10 these questions to the best of your ability based on the
 11 evidence that you heard, okay?

12 A. Okay.

13 Q. Now, let's talk about Special Issue No. 1. "Is there
 14 a probability that the defendant would commit criminal acts of
 15 violence that would constitute a continuing threat to society?"

16 That's a pretty straightforward question. But
 17 generally speaking in a case of this kind it's a murder case,
 18 which is a violent act, right? Can you conceive of a fact
 19 situation where the violence -- the underlying offense was of
 20 such a nature that you could infer that this guy might, you
 21 know, commit acts like that in the future?

22 A. Yes.

23 Q. Okay. That's what Mr. Skurka was saying is that even
 24 though a person has no criminal history, he could still get the
 25 death penalty if the underlying case is particularly, you know,

1 law says this. The law says -- and we're not trying to commit
 2 you, okay? The law says that you can answer these questions,
 3 taking into consideration all these things, but one of the
 4 things is the circumstances of the offense, okay? Do you
 5 follow me?

6 VENIREPERSON NO. 92: Yes, sir.

7 THE COURT: And the law says that you can
 8 vote -- you know you can answer this yes. Just like Mr. Jones
 9 said, you can answer this yes just based upon the facts of the
 10 case.

11 VENIREPERSON NO. 92: Okay.

12 THE COURT: All right. And then you can come
 13 over here and if that's all you're presented, you know, or
 14 you're presented nothing else bad about the defendant, could
 15 --

16 VENIREPERSON NO. 92: Then it would be tough.
 17 THE COURT: Well, tough is one thing, but if
 18 you can't do it, that's another. If you can't, that's okay,
 19 we just need to know. If you cannot answer this question --
 20 in other words, if you could never answer this question, if
 21 you were just given the circumstance of the offense, you would
 22 always vote for a sentence of life -- do you follow what I'm
 23 saying?

24 VENIREPERSON NO. 92: Yes, sir.

25 THE COURT: If you need more than that. I

158
 1 bad. You know, like, for example, let's say you have a case
 2 where somebody shoots somebody with a gun in the course of
 3 committing, let's say, a -- I don't know, in case of a
 4 kidnapping, okay? They kidnap a person and they take them out
 5 and they shoot them, okay? Or a case where somebody kidnaps
 6 somebody and takes them out and shoots them -- no, before they
 7 shoot them they torture them, you know, and do all kind of
 8 bizarre and horrible things, and then they shoot them, okay?
 9 Well, one case is obviously more violent than the other, right?

10 A. Correct.

11 Q. And from that kind of facts you can infer that, gosh,
 12 anybody would do that, I could reasonably believe that there's
 13 a probability that he might do it in the future?

14 A. Okay.

15 Q. Okay. So -- so the fact -- the fact that the
 16 evidence may not show any criminal history of the defendant
 17 does not mean you can't answer these questions truthfully; is
 18 that what you're saying? In other words, you can answer these
 19 questions truthfully based on the evidence?

20 A. On the evidence.

21 Q. Yeah, right.

22 A. Yes.

23 THE COURT: I guess -- let me ask you this.
 24 Let's cut to the chase here, because both lawyers have asked
 25 you and you did tell me you could answer these questions. The

160
 1 mean -- I'm gonna let you -- well, okay, you sound like you've
 2 got a question.

3 MR. JONES: Well, I want to get down to what
 4 we're talking about here. Basically I think we're moving to
 5 whether she can take the oath or not.

6 THE COURT: Yeah, okay. And I think she's
 7 answered on Question 1 she could base that just on the one
 8 situation.

9 MR. JONES: Right.

10 Q. (BY MR. JONES) Let's say that you're on a jury in a
 11 capital murder case and you've heard all the evidence and both
 12 sides -- both phases of the trial. And you answer Special
 13 Issue No. 1 and you say, you know what, I believe beyond a
 14 reasonable doubt that that question should be answered yes,
 15 okay? And then you go to Special Issue No. 2, which is asking
 16 you, are there any circumstances in the case that would warrant
 17 me to vote for life rather than death? And let's say that you
 18 believed that the answer should be no, this case was so bad, I
 19 haven't heard any evidence that would cause me to think that a
 20 life was a more just punishment. Okay. But then you say
 21 this -- and you know what's gonna happen. You know that if you
 22 vote yes to that and no to number 2, what's gonna happen?
 23 A. An acquittal.
 24 Q. No, no. He's gonna get the death penalty.
 25 A. Oh.

1 Q. The death penalty. So you know the effect of your
 2 answers, and you've honestly answered those questions yes and
 3 no, and the judge -- you'll be told in the charge that will
 4 result in the death penalty. But then you say to yourself,
 5 well, you know what, I didn't hear any evidence about violent
 6 past, you know, like prior convictions for violent crimes. And
 7 that's the bottom line for me, so I'm going to answer this
 8 question -- I'm gonna lie. I'm going to vote yes just so that
 9 he'll get the -- do you see what I'm saying?

10 A. Yes, sir.

11 Q. Would you do that?

12 A. No. I need -- I'm still sticking, you know, to the
 13 part that I need to find out what's going on to get him to the
 14 point where he's at right now to where I'm gonna be deciding.

15 Q. You've said that an important consideration for you
 16 would be a history of violent conduct, right?

17 A. Correct.

18 Q. Well that goes to the defendant's background. So if
 19 he has a lot of history of violent conduct, that would be an
 20 important consideration. If he doesn't have any, that would be
 21 a consideration. But you're not saying that if there's a total
 22 absence of a prior convictions for violent conduct or a history
 23 of violent conduct, that you're automatically gonna vote for a
 24 life sentence?

25 A. Correct.

1 (Venireperson enters courtroom.)

2 THE COURT: All right. Ms. Trevino, you were
 3 not selected to be on this jury, but we really appreciate your
 4 service, and we're sorry we didn't get to you right on time.
 5 Thank you for coming down here. If you need a work excuse the
 6 bailiff can get that for you.

7 VENIREPERSON NO. 92: Thank you.

8 THE COURT: See you after lunch. We'll keep
 9 going.

10 (Noon recess.)

11 THE COURT: You can ask him to come in.

12 Mr. Moore, all right.

13 Mr. Moore, come on over and have a seat here.

14

15 VENIREPERSON NO. 94,
 16 WALTER JOSEPH MOORE,
 17 VOIR DIRE EXAMINATION

18 BY THE COURT:

19 Q. All right. You are Walter Moore; is that correct?

20 A. Yes, sir.

21 Q. All right. Mr. Moore, you know we're trying to pick
 22 a capital murder jury, and we're trying to find people who can
 23 keep an open mind and be fair, okay?

24 A. Yes, sir.

25 Q. We also need people who can follow the law, okay? So

1 Q. You're not saying that?

2 A. What I'm saying is if there's a violent history, I
 3 would go rather to the death sentence. But if there's no
 4 proven, I would go to the life sentence.

5 Q. Automatically?

6 A. Automatically.

7 THE COURT: Okay. All right. Why don't
 8 you -- can you go to the jury room while I speak with the
 9 lawyers?

10 VENIREPERSON NO. 92: Yes, sir.

11 (Venireperson exits courtroom.)

12 MR. SKURKA: The State would move to challenge
 13 this juror for cause.

14 THE COURT: What say you?

15 MR. JONES: She didn't say the magic words.

16 THE COURT: I think she did. On your question
 17 she said, "I would vote automatically."

18 MR. JONES: Well, I know. That's what I'm
 19 saying. She didn't say the magic words that would qualify
 20 her. I think that's an indispensable --

21 THE COURT: I mean, you asked her and she said
 22 I would -- I mean, to her, it's -- I mean, it is a good
 23 consideration, obviously, if he's got a violent past. But she
 24 said automatically, and I just -- I think I'm gonna sustain
 25 the State's motion. Let's bring her in.

1 we're gonna talk about a few things. First of all, is there
 2 anything that would keep you from keeping an open mind in this
 3 case?

4 A. No.

5 Q. Okay. I see you haven't heard anything about the
 6 case?

7 A. I have not.

8 Q. That's fine. I mean, some people have --

9 A. I just moved here about three years ago.

10 Q. That's fine. I mean, some people have heard stuff in
 11 the media, but it's okay, as long as they can put it aside.

12 Okay. But you have not. All right. You can keep an open
 13 mind. You've never been on a jury before, but that's fine. No
 14 experience necessary. Let's talk about a few things. This is
 15 a criminal case.

16 A criminal case means that the State has the
 17 burden of proof. They brought the charges. The law says, you
 18 bring them, you got to charge -- you charge them; you got to
 19 prove it. Do you accept that?

20 A. Yes, sir.

21 Q. All right. The law says until you do, State,
 22 defendant's innocent until proven guilty. That's all of our
 23 rights. We don't make people prove their innocence here.
 24 State's got the burden of proving. Can you follow that?

25 A. Yes, sir.

1 Q. All right. Now, the burden of proof in this case is
 2 beyond a reasonable doubt. There is no definition, but I like
 3 to define it by it is not. It is not preponderance of the
 4 evidence, which is the evidence that we would use in a civil
 5 case, all right, contract dispute, kind of like a 51 percent,
 6 right?

7 A. Yes, sir.

8 Q. Clear and convincing is another standard of proof
 9 that we have in the law. That's a higher standard. That is
 10 the type of standard that we use in some civil cases. But in
 11 any event, almost notably when we have a -- the State's trying
 12 to terminate parental rights, they have to use clear and
 13 convincing evidence to prove that the parent is unfit, okay?
 14 And that sounds pretty high, right, clear and convincing?
 15 That's not -- I can tell you it's higher than the 51 percent.
 16 This is higher than clear and convincing. This is beyond a
 17 reasonable doubt, okay?

18 A. Okay.

19 Q. That's not beyond all doubt, okay, because to be
 20 beyond all doubt, you'd have to have been there. You had to be
 21 a witness, and then you'd be disqualified from being a juror.

22 Now, my question to you is this, and, of course,
 23 the whole thing is reasonable. That's the key word in that
 24 term, beyond a reasonable doubt. Could you hold the State to
 25 that burden?

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1 A. Yes, sir.

2 Q. All right. No more, no less?

3 A. Yes, sir.

4 Q. All right. Next thing, the law says, Constitution
 5 says since the State's got the burden of proof, the defense has
 6 no burden. They don't have to do anything. They don't have to
 7 put on evidence. And most notably, they don't have to put on
 8 their client. Some people say, "Well, I got to hear both sides
 9 of the story." Huh-uh. This is not a race between the State
 10 and the defense. This is only a race to see if the prosecution
 11 gets over the finish line which is beyond a reasonable doubt,
 12 okay? As part of that, defendant doesn't have to testify. And
 13 it's deeper than that because not only does he not have to
 14 testify. The law says the jury can't hold it against him.
 15 They can't say, "State, all right, we've heard your case. What
 16 about defense? Oh, defense hadn't presented anything. Okay.
 17 We're gonna put some points over here for the State because
 18 they didn't do anything." You can't do that. All right. Can
 19 you follow that law not to hold it against the defendant?

20 A. Yes, sir.

21 Q. All right. Let's talk about the case itself. The
 22 allegation is capital murder, and what is that? Well, it's
 23 murder, for sure, the intentional taking of the life of
 24 another. And the capital part makes it death penalty eligible,
 25 okay? Capital murder. The legislature has given us a laundry

1 list of what things fall into capital murder. In this
 2 particular case the allegation is that the defendant committed
 3 a murder while in the course of committing or attempting to
 4 commit a robbery, okay? So the legislature says you put
 5 robbery and murder together. Those are two serious felonies.
 6 That can get you to capital murder, all right?

7 What's robbery? Well, robbery is not burglary.
 8 That's sometimes misconstrued. I had a cousin the other day
 9 told me he was robbed. What he meant was someone had broken
 10 into his business and burglarized him. Robbery is the -- is
 11 taking property from another, either by force or by the use of
 12 threats of violence, okay? If I came to you and I held a gun
 13 to you and I said, "Give me your wallet," and you gave it to
 14 me, that's a robbery. If I come to you and I say, "Give me
 15 your wallet," and hold a gun to you and say, "I'm gonna shoot
 16 you," but you punch me in the face and knock me out, that's
 17 attempted robbery.

18 The point is, the State can get there either way
 19 in this case if they can show either the robbery or the
 20 attempted robbery; and in the course of doing so, the murder
 21 occurs. Do you follow me?

22 A. Yes, sir.

23 Q. But the State has to prove all their elements. They
 24 don't get to prove -- I don't exactly know how many, but
 25 they're a good number because there's two felony cases here.

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1 The State has to prove that this defendant in Nueces County,
 2 Texas, on the given day committed the offense of murder while
 3 in course of committing or attempting to commit a robbery, all
 4 right? You have to prove all the elements. Would you require
 5 them to prove all the elements?

6 A. Yes, sir.

7 Q. All right. Now, there are two things -- there are
 8 two possibilities in a capital murder case, if the defendant is
 9 found guilty. If the defendant is found not guilty, the case
 10 is over with, all right? If the defendant's found guilty, we
 11 go to the second part of the trial, okay, the punishment phase.
 12 There's two possibilities: Life in prison or the death
 13 penalty, okay? Both very serious punishments. But the jury
 14 doesn't deliberate and say life or death. They answer
 15 questions, okay? And let's talk about these questions. Here's
 16 the first one.

17 "Is there a probability that the defendant
 18 would commit criminal acts of violence that would constitute a
 19 continuing threat to society?" All right. What does that
 20 mean? Well, do we probably believe, that is, the jury, that
 21 he will be violent with people in the future?" Okay. Future
 22 dangerousness question. The jury answers that yes or no. All
 23 right. Then they go to the second question.

24 "After taking into consideration all of the
 25 evidence, including the circumstances of the offense --" that

1 is the first part of the trial, okay, the guilt/innocence
 2 phase, "-- the defendant's character and background --" Well,
 3 what's that? Character. Well, what kind of guy is he? Is he
 4 an honest person? Is he a good person? Is he the type of
 5 person that has high moral standards and that other than on
 6 this occasion, he's been a good guy? Or is the opposite true,
 7 he's a person of bad character, a liar and a cheat? Okay.
 8 His background, what's that? Well, his childhood, how he grew
 9 up, that kind of thing. Was he abused as a child? Did he
 10 come from a good background, okay? Stuff like that. "-- and
 11 the personal moral culpability of the defendant." All right.
 12 That's -- that's a little legalese there. But what does that
 13 mean? I like to give an example to illustrate that.

14 Two people found guilty of burglary, all
 15 right? You're the judge. The facts of the first case.
 16 Defendant breaks into a house, just trashes the place, tears
 17 the place apart. Takes everything of value, TV, video games,
 18 VCR, CD player, woman's jewelry, everything, everything he can
 19 sell. He sells it all, spends the money on hookers and
 20 cocaine, okay? That's one person.

21 The second person loses his job of 20 years,
 22 not for -- not because of his own -- not because it's his
 23 fault, but because the economy's had a downturn, and they're
 24 down sizing. Eventually he can't get a job. He can't find a
 25 job, they run out of money because they're already on the

1 juror may not. Only the jury gets to decide what is a
 2 mitigating circumstance. These lawyers will suggest to you
 3 different things. Only the jury gets to decide, okay?

4 Maybe he's an Eagle Scout. Maybe he teaches
 5 children to read in his spare time, okay? So what they want
 6 you to do here is they want you to take in everything, all the
 7 good, all the bad, the mitigating circumstances. Mitigating.
 8 What does that mean? To lessen. Circumstances that lessen
 9 perhaps not his culpability because he's guilty. It's not an
 10 excuse for the crime, but it may be a factor to take into
 11 consideration in the punishment, all right? So they want you
 12 to consider that.

13 Now -- so you have to answer yes or no. Is
 14 there sufficient mitigating circumstances? You might say,
 15 "Yes, I think the fact that he was a war hero and that he saved
 16 these people is a sufficient mitigating circumstance to -- to
 17 give him life in prison." That compiled with the others. Or
 18 you may say, "Yes, it is a mitigating circumstance, but it
 19 isn't sufficient to warrant a life sentence rather than a death
 20 penalty." Okay? Do you follow this question?

21 A. Yes.

22 Q. The jury would answer yes or no. At the beginning of
 23 every trial I ask the jurors to take an oath. They raise their
 24 right hand and I tell them, "Do you solemnly swear that you
 25 will render a true verdict based upon the law and evidence as

1 margin anyway. He's got three kids. They need to eat. The
 2 kids haven't eaten in three days. He goes into a house -- not
 3 breaks in, but he goes through an unlocked door, steals only
 4 food. He himself is very hungry, but he does not eat himself.
 5 He wants to make sure that the kids eat their fill, and he
 6 feeds his children. Now, they're both guilty of burglary.
 7 Their personal moral culpability is not the same. You would
 8 agree with that?

9 A. Yes.

10 Q. Okay. One does something for his own selfish
 11 interests; the other one does something for someone else, okay?
 12 All right. Now, after -- so I want you to consider all those
 13 things. Is there -- after considering that, is there
 14 sufficient mitigating circumstances or circumstances that
 15 warrant a sentence of life imprisonment rather than a death
 16 sentence? Okay. The second half -- the first part of the
 17 trial, all you're gonna hear about is the alleged crime itself,
 18 okay? The second half you may -- you're gonna hear about other
 19 stuff, background, I suspect. I mean, it's up to the lawyers
 20 to present this. Maybe a criminal history. Maybe there is no
 21 criminal history. Maybe you'll -- what is a mitigating
 22 circumstance? Well, example. Let's say he was a war veteran,
 23 and he saved a platoon of soldiers at the risk of his own life
 24 in the Gulf War, and he got the Congressional Medal of Honor.
 25 You may consider that a mitigating circumstance, okay? Another

1 presented to you?" And then they say yes. And I'm asking you
 2 if you can take that oath in this case. And before you answer
 3 some people tell me, "I can't take your oath because I cannot
 4 participate in a process that could lead to the death penalty."
 5 Or, "I can give him a fair trial on the guilt or innocence
 6 phase, but if we get to punishment, I will not follow your law.
 7 It means nothing to me. I am going to answer the questions in
 8 such a way that he will always get the death penalty, not
 9 giving any consideration to these questions." Neither of those
 10 people can follow the law and take the oath. But I need to
 11 know from you, can you follow the law and take the oath in this
 12 case?

13 A. Yes, sir.

14 THE COURT: All right. Mr. Skurka.

15 VOIR DIRE EXAMINATION

16 BY MR. SKURKA:

17 Q. Hi, Mr. Moore. As the judge introduced me, my name
 18 is Mark Skurka. I'm the first assistant district attorney
 19 here. Along with Mr. Schimmel, we'll be the ones at the DA's
 20 office presenting this case to if you get selected to sit on
 21 this jury.

22 The first thing I want to tell you is there's
 23 no right or wrong answers to anything you say. All we want to
 24 know is learn a little bit more about you, about your
 25 questionnaire, but as you might guess, it might lead to more

1 questions. And we just kind of want to see how you feel about
2 some of the issues in this case, okay? Let's start off with
3 the main one. I mean, obviously, the biggest issue in this
4 case is the death penalty. When you heard it was that kind of
5 case, remember that first day we were in that big room with
6 all those people, and the judge came down and said, "Look,
7 this is a capital murder case. You may be called upon to
8 decide if a person lives or dies." What was your first
9 reaction when you heard that it was that kind of case?

A. Serious case.

11 Q. I was watching some of the jurors out there, and I'll
12 tell you, I saw some of them go like, "Oh, my gosh, I can't do
13 this kind of case." And then I saw some people going like,
14 "Oh, I've got to find a way to get out of this." And then I
15 saw a lot of people just kind of sit up a little straighter,
16 listen a little closer and say, "You know, I'm here to do my
17 civic duty. I better make sure I listen to everything to what
18 the judge says." Did you feel that way?

A. I would hope that I'd follow the latter case.

20 Q. Well, I don't want to make fun of those other people,
21 but there's certain people that came out there and said, "I
22 can't sit on this kind of case because of my religion or
23 whatever." But you just thought, hey, this is a serious case.
24 I better pay attention, right?

A Yes sir

1 that the legislature said, "Look, we're not just gonna make it
2 available for every case. You got to have these certain
3 conditions meet." And I think most people agree with me that
4 those are more serious cases than just what's called plain
5 murder. I'm not saying plain murder is good or anything, but
6 it's kind of more of a filtering process, something that makes
7 it a higher level crime. I mean, like I think I told you-all
8 that day, you forge a check, you kill somebody at the same
9 time, that's not gonna be capital murder case. It's got to be
10 one of those serious crimes like robbery, rape, kidnap, murder,
11 burglary. And that's what makes it this kind of case. It's
12 the murder plus the robbery or the robbery plus the murder,
13 however you want to say it. Just the fact that it's a robbery
14 case doesn't necessarily mean it's a – what do you call,
15 complete robbery. In other words, the law said if you – if
16 you kill somebody while in the course of committing robbery or
17 attempting to commit robbery, you're guilty of the crime. It
18 doesn't matter how much you get, how far along you went in the
19 robbery, did you get away with the money, did you not get away
20 with money. As long as you took the property by force or
21 threats of force, you're guilty of robbery. And the judge will
22 give you more instructions at the end of the trial if you're
23 selected on this jury in a packet of instructions called the
24 jury charge. And that will give you some more depth on to the
25 law.

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1 Q. When we talk about the death penalty, you know, we
2 kind of use that word a lot and interchange it with capital
3 murder, but there's some facets of law I need to go over with
4 you about the capital murder cases and why it's a death penalty
5 case, a possible death penalty case. And I keep saying
6 possible because by no means is it absolute and is it
7 automatic. You have two choices: Death or life in prison.
8 Before you had jury duty that day, did you think that every
9 murder case could be possibly a death sentence case?

10 A. I really hadn't thought about it in depth. But yeah,
11 I think probably in the back of my mind, I would have thought
12 that that would have been reasonable.

13 Q. A lot of people thought that. And there's nothing
14 wrong because you just don't know enough about the law. But in
15 Texas, they have a scheme set up that says, Look, it's not just
16 every murder case can qualify for the death penalty. We're
17 gonna make these certain conditions on them. Killing a cop on
18 duty, you know, killing somebody while you're robbing them or
19 raping them or kidnapping them or burglarizing them; killing
20 somebody -- killing more than one person at the same time;
21 killing a child under six. In other words, they put these
22 special conditions on it to make it a capital murder case. And
23 it's nothing unusual where jurors think, well, I thought every
24 murder case gets the death penalty. I have to tell them, no,
25 it's just those certain cases. And it's probably good, right,

6 A. I think that it's my duty. I've never been one to
7 shirk my responsibilities.

8 Q. And a lot of jurors say that. They say, you know,
9 I'm not real happy about having to do it. I'm not overjoyed to
10 be sitting on a jury making that decision, but the law is the
11 law and my duty is my duty. It's my civic duty to go through
12 with it. But we have certain people -- and I'm not saying
13 they're wrong or anything, but certain people will say, Look,
14 put me on a DWI case, put me on a shoplifting case. Don't put
15 me on this kind of case. But I'm reading from you that it
16 doesn't really matter what kind of case it is; I will do my
17 civic duty one way or the other?

18 A. Yes, sir.

19 Q. Is that better said?

20 A. Yes, sir.

21 Q. As the judge told you, there's nothing automatic in
22 this case. Just because a person's found guilty of capital
23 murder doesn't mean they automatically get the death penalty.
24 You have to kind of jump through some hoops and answer some
25 certain questions to get to that point. For example, in most

1 cases, say you had just a regular burglary case. You might
 2 have a range of punishment from two years to 20 years in
 3 prison, and you pick a number based on how serious the case is.
 4 You might go to 20 years. You might go to two. You might go
 5 in between. Who knows? In this case we don't pick out death
 6 or life in prison. What we do is answer -- what the jury does
 7 is answer certain questions, and based on how those questions
 8 are answered, the decision is reached.

9 The first question is on the board behind you,
 10 and I ask you to turn to look at it with me. And it basically
 11 says this. This is presupposing a person's found guilty and
 12 proven beyond a reasonable doubt, you go -- and you might get
 13 to hear additional evidence. Then you answer that question.
 14 "Is there a probability that the defendant would commit
 15 criminal acts of violence that would constitute a continuing
 16 threat to society?" The key words in there I want you to look
 17 at is the fact is there a probability. Unless you got a
 18 crystal ball, there's no way I could prove to you on certainty
 19 that that person's going to do it, right? You don't know how
 20 to look in the future to do that.

21 The second part says, "would commit criminal
 22 acts of violence." Sometimes people say, "Well, you know,
 23 Mr. Skurka, I can only give the death penalty if I think he's
 24 gonna murder again, or he's gonna do a capital murder again."
 25 And I tell them, "It just says criminal acts of violence. It

1 the news, maybe guards -- I'm sorry, guards getting attacked by
 2 prisoners, or prisoners hurting other prisoners. We know that
 3 happens. All I'm just trying to say is it sounds kind of funny
 4 that prison is part of society, but it still is. You're not
 5 completely away from society. I mean, you've lost some rights
 6 and stuff like that, but you're not out there in nowhere land
 7 or you're not in a vacuum where there's no one else there,
 8 okay? It's kind of a thing that people say, well, you know,
 9 society can't be prison and I have to tell them yeah, it is,
 10 because there's other people in there.

11 Okay. You answer that question yes or no based
 12 on the evidence. Then you go to the second question. The
 13 second question is what we call the mitigating circumstances
 14 question. It kind of goes like this. You've heard the
 15 evidence and you think he's guilty of capital murder. You hear
 16 the evidence and you answer that special question yes. Yes, I
 17 think there's a chance that he can be a danger in the future.
 18 It looks like he's heading toward the death penalty. But the
 19 judge says, "Stop, wait. Before you give the death penalty, is
 20 there any reason to give him a life sentence instead of a death
 21 sentence?" It's kind of like checks and balances, you know.
 22 You don't want to rush into things, and the judge is gonna tell
 23 you to re-examine everything and see if there's a reason to
 24 give him a life sentence rather than a death sentence. And
 25 that's what mitigating circumstances means, anything that would

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1 doesn't say you think he's gonna murder somebody again. It
 2 could be any kind of act of violence."

3 And the third part says, "Would constitute a
 4 continuing threat to society." What does society mean to you,
 5 that word "society"?

6 A. The general public.

7 Q. General public. Okay. Let me ask you a trick
 8 question now then. Some people come up to me and they say,
 9 "Mark, why does the State seek the death penalty on this case?
 10 Just lock him up in prison. He can get a life sentence, lock
 11 him in prison, and he can never hurt anybody again." And I
 12 say, "Well, there's a fallacy there. What that fallacy is, is
 13 that there's no one else in prison with him." Because who else
 14 is in a prison system?

15 A. Other prisoners.

16 Q. Other prisoners. Who else?

17 A. Jailers, cops.

18 Q. People that work at the prison, guards, you know,
 19 maintenance people, the warden, his staff. So it's not like we
 20 put somebody on a desert island where they're never going to
 21 have social interaction again. So would you agree with me that
 22 just putting somebody in prison doesn't necessarily mean they
 23 can't hurt anybody?

24 A. Definitely.

25 Q. Right. And you probably heard about that, right, on

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1 lessen or make less severe the punishment. In other words, he
 2 did the crime, but is there any reason to give him a break?
 3 Let's say, for example, I had a lady up here earlier had two
 4 teenage sons. And we'll call one the good son and one the bad
 5 son, just for purposes of the illustration. And her rules in
 6 the household was curfews at 11:00. You must be home by 11:00
 7 or else you violate curfew. And if you violate curfew, you're
 8 gonna get grounded or whatever. Let's just say grounded.

9 The first son comes home at 11:03. He misses
 10 curfew by three minutes. Mom says, Why did you miss curfew?
 11 You know you're supposed to be home by 11:00. And he says, I
 12 would have been home by 10:45, except I had a flat tire over
 13 here on the way home. And I had to stop and change a tire, and
 14 that took about 20 minutes or more and so that's what the
 15 reason I'm late. And that's why I violated your curfew. And
 16 this is kind of the good kid. He's never really broken curfew
 17 before in his life. This is the first time he's ever broke
 18 curfew. Okay. The mother's got to decide what kind of
 19 punishment he gets.

20 The second son. Okay. The second son has also
 21 violated curfew. The trouble is he didn't come in three
 22 minutes after 11. He came in at 3:00 in the morning. He
 23 busted curfew by four hours. Mom says, Why were you so late?
 24 Why did you miss curfew? And he says, Well, I was at a party
 25 with my friends drinking and having a good time. And, you

1 know, he smells like alcohol on his breath. And I just didn't
 2 get around to coming home. Mom says, Okay. And then she
 3 says -- this is her bad son, so to speak, and guess what, this
 4 isn't the first time he's broken curfew. This is the fifth
 5 time he's done it this year so, he's kind of got a bad history
 6 of breaking curfew. Well, you go back. Mom's got to make a
 7 decision. How much am I gonna ground these people? They both
 8 violated my rules of curfew, but do you really think she's
 9 gonna punish the first kid as bad as she's going to punish the
 10 second kid?

11 A. No.

12 Q. Why not? And the reason is this, mitigating
 13 circumstances. I think in your questionnaire you called them
 14 extenuating circumstances, which is kind of similar, but the
 15 whole point is that if you made a decision based on just what
 16 the violation is, they broke curfew, wouldn't you want to know
 17 all the surrounding circumstances before you decide punishment?
 18 My gosh, that first kid three minutes late as opposed to four
 19 hours late. The first kid had a pretty good reason for missing
 20 curfew, having a flat. The other guy had no good reason. And
 21 then the fact he'd never broke curfew before, and the other guy
 22 had broken it five times before. Once you hear an example like
 23 that, right, you can understand how something can be a
 24 mitigating circumstance when the judge told you about the
 25 burglar. And that's all this question asks you.

1 anything, because you probably want to know what the
 2 background is, if it's good or bad, before you, as a jury,
 3 make that decision, right? That's only a fair question.
 4 All I can tell you, too, is the judge can't
 5 tell you what a mitigating circumstance is. It's up to you as
 6 a jury to decide. Some people may say, "Well, yeah, I'm gonna
 7 give them a break because of this. Maybe he's an orphan or he
 8 came from a broken home or something." And then some people
 9 say, "You know, I don't care if he came from a broken home, I
 10 don't care if he's an orphan, he still did the crime; he still
 11 did the time." The only thing you have to do is consider
 12 everything. What weight you give to it is up to the jury.
 13 And then you do that balancing test. It may be enough. Maybe
 14 it's not enough. That's up to you as the jury.

15 One thing the judge may also tell you is this
 16 part of the law, which says this. "Voluntary intoxication is
 17 not a defense to crime." Voluntary intoxication. In other
 18 words, if you went and got yourself drunk or high on drugs and
 19 you go commit a crime, is that an excuse to the crime?
 20 Absolutely not. The law says that in black and white. You
 21 can't use that as an excuse for crime or a defense to crime.
 22 However, the judge may say, that could be a possible
 23 mitigating circumstance. Say a guy robs a bank. The jurors
 24 go, yeah, he robbed the bank, but you know, he was drunk when
 25 he did it so maybe we're not going to give such a high

1 Look at all of the evidence, take into
 2 consideration all the evidence, including the circumstances of
 3 the offense. You know, how bad of an offense was it? Was it
 4 a really heinous crime? Was it a fairly minor crime. His
 5 character and background. Good background, bad ground. Has
 6 he ever been in trouble with the law before? He's always in
 7 trouble with the law. And his personal moral culpability. Is
 8 there sufficient -- is it enough of a mitigating circumstance
 9 to warrant that a life imprisonment rather than the death
 10 sentence be imposed? In other words, just because you hear a
 11 mitigating circumstance, a possible mitigating circumstance,
 12 does that mean you automatically lower the sentence? No, you
 13 kind of do a balancing test like that mother had to do. Okay.
 14 You know, this one is worse than this one. Does it outweigh
 15 everything else, you know? Because maybe the second kid, even
 16 though he broke curfew by three hours or four hours and was
 17 late and didn't have a really good excuse, maybe the weekend
 18 before he had volunteered to help people at the old folks home
 19 and, you know, helped out at school or brought home an A in
 20 his class. Well, she may say, well, those are mitigating --
 21 possible mitigating circumstances. It's good that you
 22 volunteered at the old folks home. It's good that you made an
 23 A in geometry, but that's not gonna outweigh what you did
 24 here. You see what I'm saying? And I think it's a careful
 25 way for the jury to consider everything and not rush into

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 1 sentence. Other people may say, Well, he robbed a bank and he
 2 was drunk, but he still robbed the bank, you know. Just
 3 because he was drunk doesn't mean I'm gonna lower the
 4 sentence. Do you see what I'm saying?

5 A. Yes, sir.

6 Q. So intoxication could be one of those you could
 7 consider, but it doesn't necessarily mean you have to consider
 8 it. And the judge said possible mitigating circumstances.
 9 Sometimes people will look at the defendant and they say,
 10 "Well, gosh, you know, he sure seems young, or he doesn't look
 11 like a bad guy." What's the problem with saying stuff like
 12 that? Well, you're judging a book by their cover, right? Were
 13 you surprised when you came in the courtroom and saw what he
 14 looked like or how young he looked?

15 A. No.

16 Q. And it shouldn't make a difference. When you make a
 17 decision as a jury you should make it on facts and evidence,
 18 right? Although we've had, you know, some nice ladies coming
 19 in here and say the first thing I saw was, you know, he's so
 20 young, you know. And I'm thinking, are you gonna use that in
 21 making your decision? The law says as long as you're over 18
 22 years old, you to have face the consequences of your action. I
 23 mean, we don't have the death penalty for kids who are 13 or
 24 16, or something like that, which is probably right, you know.
 25 But would you agree with me by the time you reach that age of

1 like 18 and you're an adult, you should know the difference
 2 between right or wrong and should be responsible for your
 3 actions?

4 A. I agree with that.

5 Q. Okay. A couple of more legal things I want to talk
 6 to you about is, number one, to qualify on this jury, you have
 7 to kind have of start equal. In other words, you can't be
 8 leaning towards guilty; you can't be learning toward not
 9 guilty. You can't be leaning toward death penalty. You can't
 10 be leaning toward life sentence. Are you leaning either way
 11 right now?

12 A. No.

13 Q. The only way you should start out, really, is with
 14 the presumption of innocence. Right now as he sits there, he's
 15 presumed innocent. And why is that? Because the State hasn't
 16 brought you any evidence to prove to you beyond a reasonable
 17 doubt. Just remember that, the presumption of innocence is
 18 just a presumption. You presume him to be innocent right now.
 19 Every case I've ever tried the guy starts with the presumption
 20 of innocence. Does that mean he is innocent? No. It just
 21 means you haven't heard any evidence. Do you see what I'm
 22 getting at? You don't start him behind in the count, you know,
 23 in baseball. He doesn't already have a strike against him
 24 because he's here. You have to start him out equal and assume
 25 that he's not guilty unless the State proves it. And that's a

1 with something, the State better back it up and prove it.

2 Now, all that basically means is, you can --
 3 the defense never has to prove anything. We have to prove the
 4 case. Can you follow that law?

5 A. Yes, sir.

6 Q. And the rule of -- the standard, how much evidence?
 7 The standard is beyond a reasonable doubt. It doesn't mean
 8 beyond all doubt, any doubt, shadow of a doubt. I always hate
 9 that when they say it on those TV shows, beyond a shadow of a
 10 doubt because that's not really what the law is. It just says
 11 beyond a reasonable doubt, which I like to tell people is,
 12 first of all, look, if you -- do you have a doubt? If you have
 13 a doubt, that's okay. But then the question is, if you don't
 14 have a doubt, you go ahead and vote for guilty. But then if
 15 you have a doubt, ask yourself is it a reasonable doubt? In
 16 other words, do I have a reason for the doubt. I mean, I can
 17 put my finger on it and it's because of this or that, not just,
 18 well, I feel this or it could be this or maybe this. You know,
 19 is there a reason for the doubt?

20 When you were in the military, you said were you
 21 in the Navy for like some 36 years. Did you work --

22 A. Twenty-eight years.

23 Q. Twenty-eight years, I'm sorry. Did you work on
 24 airplanes the whole time or what?

25 A. I was both service and aviation. First 16 years I

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1 burden we have to prove in this case, every other case, okay?

2 The indictment itself, the fact that he's
 3 charged with a crime, that doesn't mean he's guilty either.
 4 That just means a grand jury has found enough evidence to bring
 5 him to court. Does that mean he's guilty? No. It just means
 6 he's charged that. It still rests on the State to prove the
 7 case beyond a reasonable doubt.

8 Sometimes jurors want to hear the other side of
 9 the story. They'll say, well, you know, you put on a good
 10 case, State, but I want to hear what he has to say, or I want
 11 to hear what the defense witnesses say. And I have to caution
 12 you. I think the judge hit on this a little bit. Remember
 13 that the Fifth Amendment says you can testify if you want to.
 14 If you don't want to testify, you don't have to. And the judge
 15 will tell you, you cannot hold that against him. Do you agree
 16 with that law?

17 A. Yes.

18 Q. And you can follow that law, correct?

19 A. Yes.

20 Q. Same thing with the defense. You know they don't
 21 have to put on any evidence at all. Sometimes people say,
 22 well, he didn't testify but they should have found some other
 23 witnesses to testify. They don't have to prove anything. And
 24 why is that? The State has to prove the case beyond a
 25 reasonable doubt. As the judge said, if the State charges you

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1 was in the service Navy, and then I got my commission and I
 2 spent the last 12 years as an aviation maintenance officer.

3 Q. So that's taking care of airplanes?

4 A. Yes, making sure that they're able to go fly.

5 Q. What kind of airplanes did you work on?

6 A. H-46s and P-3s.

7 Q. I know a P-3 is that one that has the dome on it,
 8 right?

9 A. Well, the ones that the --

10 Q. Base here --

11 A. -- immigration uses -- not immigration --
 12 naturalization. The Border Patrol, the ones that they use have
 13 the radome on it. The Navy P-3 version does not have the
 14 radome. It's a sub hunter.

15 Q. Okay. That's what I was trying to figure out because
 16 I know they have -- the PC3 is like the Navy's version -- a PC3
 17 flies off the aircraft or the ship or something, and it goes
 18 searches the water around it for submarines, correct?

19 A. No.

20 Q. Okay. You tell me.

21 A. P3 Charlie is shore-based. It's a long range and has
 22 submarine warfare, subdetection. It also now its a new role is
 23 now its old horizon targeting because it can go fly -- stay out
 24 on patrol for 12 or 13 hours and fly out beyond where the
 25 carriers are, you know. Although it doesn't sit on the

1 carriers, it would launch from a shore base and be able to pick
 2 out targets far out beyond what the fighters can go see or
 3 beyond visual contact.

4 Q. Is that kind of like what AWACS do for the Air Force?

5 A. AWACS is very similar. They're more like the -- they
 6 pick out the targets and things. They're more like the air
 7 traffic controllers in the sky.

8 Q. But they're kind of like the eye in the sky?

9 A. The eye in the sky. They direct everybody of where
 10 to go, what to do, and who to do it to.

11 Q. Yeah. They're like air traffic controllers, but they
 12 can also direct the traffic toward targets too, correct?

13 A. Absolutely.

14 Q. But the Navy doesn't have AWACS. They have --

15 A. Well, we use the P3 for that now.

16 Q. P3 for that.

17 A. That, and we use the E2.

18 Q. Is the E2 a Hawkeye?

19 A. E2 Hawkeye, yes. That's the one that's got the
 20 radome.

21 Q. You can tell I read too much Tom Clancy novels and
 22 stuff, right?

23 A. Yeah.

24 Q. No, it's interesting to hear about that. But those
 25 are the kind of thing you work -- do you kind of just work your

1 sorry, can you vote not guilty?

2 A. Yes.

3 Q. And if the evidence is there, that you think he is
 4 guilty, can you vote guilty?

5 A. Yes.

6 Q. If the evidence is such that you answered those
 7 questions that you think he should get a death sentence, can
 8 you go follow through with that?

9 A. Yes, sir.

10 Q. And the opposite, if the evidence is such that you
 11 think that there are mitigating circumstances that he should
 12 get a life sentence, can you vote for that?

13 A. Yes, sir.

14 Q. Okay. Bottom line is you're open-minded, will listen
 15 to everything before you make a decision?

16 A. Yes, sir.

17 Q. That's all we can ask you to do.

18 MR. SKURKA: Thank you, Mr. Moore.

19 MR. GARZA: May I proceed, Your Honor?

20 THE COURT: Yes.

21 VOIR DIRE EXAMINATION

22 BY MR. GARZA:

23 Q. Good afternoon, Mr. Moore. My name is Ed Garza. I
 24 think I had introduced myself previously when we met downstairs
 25 in the big jury room. And my co-counsel here is Mr. Grant

1 way up in the service?

2 A. Yeah.

3 Q. You got your commission?

4 A. Yeah, I spent 16 years enlisted, got a degree,
 5 applied for a commission, and the Navy was silly enough to make
 6 me an officer.

7 Q. Well, I don't think they regret it too much. We had
 8 a guy here earlier -- I'm not sure if he's on the jury -- but
 9 he was a chief petty officer. I said, is it true that chief
 10 petty officers run the Navy? He goes, you're darn right.

11 A. Absolutely.

12 Q. That's what he said.

13 A. I made chief before I got my commission.

14 Q. Well, so you were -- that's a pretty big
 15 responsibility there. Like I said, they're the backbone of the
 16 Navy.

17 Okay. I think we've covered all the legal
 18 stuff. The bottom line is this, do you think you can be fair
 19 in this case?

20 A. Yes, sir. I think I can.

21 Q. Will you listen to all the evidence before you make a
 22 decision?

23 A. Absolutely.

24 Q. If you think the evidence is not sufficient enough
 25 that you don't think he's guilty, can you vote guilty? I'm

1 Jones, and our client is John Henry Ramirez.

2 I want to talk to you about -- well, there's so
 3 many things we need to talk to you about, and the reason we do
 4 that is because we only get this one chance to discuss the
 5 issues in this case to make sure that you understand them for
 6 us to make a good, informed decision on behalf of our client to
 7 see if we can qualify you to be a juror in this case, okay?

8 A. Yes, sir.

9 Q. So some of the stuff we might ask you, you might
 10 think is maybe kind of silly or you're wondering why are they
 11 asking this. But, like I said, this is the only chance we get
 12 to do that, okay? So we have to discuss everything, in other
 13 words, okay, without presupposing that, oh, we've already made
 14 this assumption or we've made that assumption. But more
 15 importantly, we need to make sure that you have not made any
 16 assumptions in this case.

17 Whenever, in Texas, a person is called to jury
 18 duty, he's being called to task to judge the facts of these
 19 cases, and we need to know that you're going to be impartial,
 20 okay? What does impartiality mean to you?

21 A. You make your decision based on the evidence that's
 22 brought to you. You're not presupposing anything.

23 Q. Absolutely. You come to the task without any
 24 opinions, no presuppositions of any sort or anything like that,
 25 no biases, no leanings of any sort; is that correct?

1 A. Yes, sir.

2 Q. Okay. Now, in your questionnaire, though, I notice
3 that one of the last pages when you were asked on a scale of 1
4 to 10 how strongly you believe in the death penalty, one being
5 the least, 10 being the strongest, you indicated a 10.

6 A. Yes, sir.

7 Q. Why did you do that?

8 A. I believe that it's a necessary part of our society.

9 Q. Okay. Do you think we benefit from it?

10 A. Yes, sir.

11 Q. How do we benefit from it?

12 A. I think we benefit as a society that the individual
13 does not commit the crime again, and it goes along with the
14 continuing -- continued threat to harm other persons in
15 society.

16 Q. Any other way?

17 A. No. I hemmed and hawed about the whole supposition
18 about, you know, it deters crime and things like that. Well, I
19 spent six months over in Saudi, and they do public executions
20 over there. And yeah, maybe it has an initial impact, but in
21 the overall course, I don't think that it really has as much as
22 a lot of people think it does.

23 Q. Okay.

24 A. But it keeps the criminal from committing another
25 like crime again and having that happen to another person or

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1 persons.

2 Q. That's an interesting answer. So, let me ask you a
3 few more questions. What would be the first requirement under
4 our law based on the things that have been explained to you
5 already? What would be the first requirement before you were
6 asked to decide any of these two issues?

7 A. They'd have to be a heinous crime. It would have to
8 be a very, very serious crime to consider even the possibility
9 of the death sentence.

10 Q. The judge explained to you that capital murder is a
11 homicide coupled with the commission of yet another pretty
12 serious offense?

13 A. Yes, sir.

14 Q. Is that what you understand it to be?

15 A. Yes, sir.

16 Q. And our legislature says that not all cases are
17 capital murder cases, okay?

18 A. Uh-huh.

19 Q. Let me give you an example. Heaven forbid someone
20 walked in here and shot and killed the judge. Would that be
21 capital murder? You look stunned.

22 THE COURT: Not unless it was in retaliation
23 for a ruling.

24 MR. SKURKA: There are some standards where
25 that happens.

1 Q. (BY MR. GARZA) What I'm trying to tell you is not
2 all murders --

3 A. Okay.

4 Q. -- are susceptible or call for the death penalty as a
5 possible punishment.

6 A. Okay.

7 Q. Okay. Somebody kills his wife, chops her into pieces
8 and mails her to the four corners of the earth. Is that a
9 capital murder?

10 A. No.

11 Q. It's not. Yes, it's heinous. Yes, it's pretty
12 terrible, but it's not. Okay?

13 A. Uh-huh.

14 Q. So my question was, again -- is, what would be the
15 first condition that would have to occur before you could
16 say -- before you would be asked to consider these two issues?

17 A. Well, you're saying the first condition. First
18 condition, in my mind, is that heinous crime coupled with the
19 murder the -- that, combined together is what makes it a
20 capital offense, my understanding from the judge and from --
21 before I ever have to go to these questions is that it's a
22 combination.

23 Q. Well, wouldn't you have to find that person guilty
24 first?

25 A. I'm sorry, I'm --

1 Q. You're not following me?

2 A. -- not following you.

3 Q. In this proceeding, in this criminal proceeding,
4 there's two parts to a jury trial. The first part of the jury
5 trial is the guilt/innocence.

6 A. Right. You'd have to find him guilty, and then you'd
7 make the decision of whether it's life imprisonment or it's the
8 death penalty.

9 Q. Right. That's where I'm getting to you.

10 A. Oh, okay.

11 Q. That would be the first condition you'd have to meet.
12 A. Okay. I thought you were asking what crime, not that
13 you had to find them guilty. Okay. Now I understand what
14 you're saying.

15 Q. In this proceeding, the State of Texas would have to
16 prove beyond a reasonable doubt.

17 A. Yes.

18 Q. And those matters would be laid out and you would
19 consider as to whether or not my client is guilty or not, okay?
20 As he stands here before you -- and I don't want to beat this
21 dog to death -- he's presumed innocent, the presumption of
22 innocence and what that means, okay? I think you understand
23 that, do you not?

24 A. Yes, sir.

25 Q. So the first call to order would have to be whether

1 or not you-all make a finding of guilt. If you don't, the
 2 government doesn't prove their case, it's all over. We all go
 3 home.

4 A. Yeah.

5 Q. We don't even have to get there.

6 A. Yeah.

7 Q. Okay? But we have to discuss this matter just in
 8 case that could happen, okay?

9 Now, with respect to Special Issue No. 1, let's
 10 say you've already made a decision among the other 12 -- the
 11 other 11 jurors, including yourself, that the State has proven
 12 their case to you beyond a reasonable doubt. You're going to
 13 be asked, is there a probability that the defendant would
 14 commit criminal acts of violence that would constitute a
 15 continuing threat to society, okay? What kind of evidence
 16 would you need to hear or want to hear to try and make that
 17 determination?

18 A. Has he been violent to people in the past.

19 Q. Okay. Anything else?

20 A. Not just one time. Has he -- has he shown a pattern
 21 of violence towards people.

22 Q. All right. Okay. That would assist you, wouldn't
 23 it?

24 A. Yes.

25 Q. Okay. And it would also assist you if he hadn't any

1 Q. Ten out of 12.

2 A. Okay.

3 Q. Ten out of 12 works in his favor. If it's gonna work
 4 against him, the statute requires 12 out of 12. Does that make
 5 sense?

6 A. Yes. Yes.

7 Q. Why do you think that makes sense?

8 A. If there's -- if there's that amount of doubt, then
 9 it should go in the favor of the defendant.

10 Q. Exactly. That's exactly right. Okay. All right.

11 Let's presuppose, once again, speaking hypothetically here,
 12 that you get passed Special Issue No. 1, then you're gonna be
 13 asked to consider Special Issue No. 2, okay? And I'm gonna ask
 14 you if you turn around, do me the favor of reading it to
 15 yourself, and then let me know when you're done reading it.

16 A. (Witness complies.) Okay.

17 Q. Okay. Is there anything up there that you don't
 18 understand, any words?

19 A. No. Now, between with what the -- the judge's
 20 explanation and example and the government's, I feel more
 21 confident with what I'm was -- what I'm understanding of this.

22 Q. Okay. I'm gonna try explain to you a little
 23 differently though, okay?

24 A. Okay.

25 Q. And I'm gonna do so by asking you some questions,

1 pattern of any sort to try and determine if he's a future
 2 dangerous -- a future danger to the society --

3 A. Yes, sir.

4 Q. -- we live in, correct?

5 A. Yes, sir.

6 Q. Okay. Our law says that in order for you to answer
 7 that issue, it takes all 12 of you to answer it yes before you
 8 can proceed to Special Issue No. 2 --

9 A. Okay.

10 Q. -- which would be a majority finding that, yes, based
 11 on all -- everything you've heard in the case and based on any
 12 punishment evidence, all 12 of you would have to answer yes to
 13 that issue --

14 A. Okay.

15 Q. -- okay? But the statute also provides that if as
 16 many as 10 of you decide that you want to answer that no, then
 17 the trial is over, okay? Because if you can't get past Special
 18 Issue No. 1, okay, then you're not supposed to come back to
 19 No. 2. You're supposed to return a verdict informing the Court
 20 that 10 of the 12 believe that, no, we do not see him as a
 21 future danger, okay? The case is over and he gets a life
 22 sentence.

23 A. Okay.

24 Q. Okay? Do you understand that?

25 A. Uh-huh, yeah. You're saying 10 out of 12?

1 which I don't mean to embarrass you by or anything, but I just
 2 want -- I want to make sure that you understand these concepts,
 3 okay?

4 A. Sure.

5 Q. Mitigating -- the term "mitigate," to mitigate, the
 6 verb, what does that mean to you?

7 A. To lessen.

8 Q. Absolutely. That's exactly what it means. Okay.

9 This issue came from a Supreme Court case written by lawyers,
 10 written by what some people consider legal scholars, which are
 11 the Supreme Court. And a lot of these words give certain lay
 12 people, even us lawyers, a little bit of difficulty

13 understanding. But, anyway, we've had to interpret this for
 14 many, many years since it was rendered, since it was decided.

15 But what it's asking you to do is that even though you've
 16 already made a finding of guilt, okay, the matters that are up
 17 there, we're not asking for you to consider as a defense to the
 18 crime. We're asking you to consider it as a mitigation --

19 A. Right.

20 Q. -- if it can be sufficiently shown to you. It places
 21 a certain burden on we, the lawyers, now since it's been
 22 decided that we are in -- if we're going to undertake to
 23 represent these folks in these kind of cases, it is our
 24 responsibility to make investigations into our client's
 25 background, into their character to present to you in a fashion

1 and a form where you will be able to give some consideration or
 2 effect to that evidence in deciding one more time whether or
 3 not our client deserves a life sentence, or, if we can't prove
 4 it up to you sufficiently, the death penalty, okay?

5 A. Okay.

6 Q. So what would character mean to you, evidence of a
 7 person's character?

8 A. How they treat themselves, how they treat other
 9 people, how they interact with other people, the things that
 10 they do in day-to-day life.

11 Q. Okay.

12 A. How they conduct themselves.

13 Q. Are they -- like if I were to say that you were a
 14 person of good character, what do you think I would be saying
 15 about you?

16 A. That I treat people the way I would like to be
 17 treated, that I deal with people fairly and honestly.

18 Q. Fairness, honesty, trustworthiness?

19 A. Yes.

20 Q. Things of that nature?

21 A. Yes.

22 Q. Okay. What about background?

23 A. As far as?

24 Q. A person's background?

25 A. Well, their --

1 from our parents, our teachers, our church, about how to try
 2 and be good people, how to be good to each other and one
 3 another and each other, okay?

4 A. Uh-huh.

5 Q. Do you believe that?

6 A. Yeah.

7 Q. Okay. And what we need to know and what we need to
 8 allow you to consider is whether or not certain defendants have
 9 learned, first of all, what those values are. Has he had a
 10 chance -- has she or he had a chance to learn those values?
 11 Would it make a difference?

12 A. Yeah.

13 Q. Okay. And then the culpability comes down to the
 14 same thing about these examples, okay, about the -- you know,
 15 the person who goes out and, you know, commits a burglary to
 16 steal things for his own self-serving needs, for his own
 17 selfishness, versus the guy who, say, breaks or walks into
 18 someone's home and finds the back door open and then all he
 19 does is actually go in there to grab some bread and some food
 20 to feed his hungry family because he's lost his job, okay?
 21 Would you agree with me that there's a difference in the degree
 22 of culpability?

23 A. Yes.

24 Q. There are certain moral conflicting values, are there
 25 not --

1 Q. Their biology -- I mean, their biography, in other
 2 words, their background, where they grew up, how they grew up.
 3 What does that mean to you?

4 A. The way they were raised, what kind of home they came
 5 from.

6 Q. Exactly. Exactly, because then we lead up to this
 7 other question about asking you to consider his personal moral
 8 culpability, three very distinctive words, a person's moral
 9 culpability. What would that mean to you?

10 A. What was the reason they did what they did.

11 Q. Correct. That's pretty close; it really is. It's
 12 been sort of explained to us through legal periodicals and
 13 writings by other lawyers and scholars, and things of that
 14 nature, that moral culpability is a -- is a form of
 15 blameworthiness, okay?

16 A. Okay.

17 Q. A form of blameworthiness.

18 A. Okay.

19 Q. What do we mean by that? Well, you've been given
 20 those examples about the kids and the curfew and what the
 21 extent of their blame is insofar as how you're going to
 22 consider their punishment for doing something wrong. Moral is
 23 our compass, is our core values, correct? Things that we've
 24 learned through the Ten Commandments, the Boy Scout Code,
 25 things of that nature? Things that we've hopefully learned

1 A. Yes.

2 Q. -- that are going on in these people's minds,
 3 especially the one who goes in to grab some food for his
 4 family? Do I violate the law or do I sit there and watch my
 5 family starve?

6 A. Yeah.

7 Q. Okay. That's what that means.

8 A. Okay.

9 Q. Can you give some effect and consider all those
 10 matters in making a determination as to whether or not that is
 11 a sufficient mitigating circumstance that would allow you to
 12 consider a life sentence versus the death penalty?

13 A. Yes, sir.

14 Q. Could you do that?

15 A. Yes, sir.

16 Q. Mr. Moore, do you have any questions of us or
 17 anything?

18 A. No, not really.

19 Q. The judge has probably explained or had mentioned
 20 maybe back that we're in the process of selecting jurors, and
 21 that we may end up starting testimony or hope to start
 22 testimony by December 1st. The case could run anywhere from 10
 23 days to two weeks. It is right before the holidays, right
 24 before Christmas. Anything at all going on in your life that
 25 would be distracting to you if you were chosen as a juror?

1 A. Nothing distracting, no.

2 MR. GARZA: All right. Thank you, sir.

3 THE COURT: Anything else, Mr. Skurka?

4 MR. SKURKA: No, Judge, I don't have any
5 other questions. Thank you, Mr. Moore.

6 THE COURT: Mr. Moore, please wait in the jury
7 room and we'll be right back with you.

8 (Venireperson exits courtroom.)

9 THE COURT: All right. What says the State?

10 MR. SKURKA: We'll go ahead and accept this
11 juror, Judge.

12 THE COURT: What says the defense?

13 MR. GARZA: We'll use another peremptory,
14 Judge.

15 THE COURT: All right. That's No. 11, I
16 think. All right. Let's bring in Mr. Moore.

17 (Venireperson enters courtroom.)

18 THE COURT: All right. Mr. Moore, you were
19 not selected to be on this jury, but we do appreciate your
20 time and service to the community by coming down here. Thank
21 you very much. If you need a work excuse, the bailiff can get
22 that for you.

23 VENIREPERSON NO. 94: All right. Thank you.

24 THE COURT: Thank you. We'll take a little
25 break and be at it again.

1 okay. No experience necessary.

2 Let's talk about concepts. First of all, this
3 is a criminal case. That means the State has the burden of
4 proof. The law says, State, you bring the charges, you got to
5 prove them. Do you believe in that?

6 A. Yes.

7 Q. Okay. As part of that the law says, Look, State, you
8 bring the charges, you got to prove them. As part of that,
9 until you do, if you can, defendant is innocent until proven
10 guilty. Do you follow me?

11 A. I follow you.

12 Q. In other words, some places the State charges
13 somebody with a crime, and they're guilty until they can prove
14 otherwise. We don't do it that way here. The law says, Hey
15 man, you bring the charges, you've got the evidence, that's
16 fine. But until you show it to the people, he's innocent until
17 proven guilty. And maybe they can't and maybe they can, okay,
18 but you follow that -- I mean, you agree with that, you follow
19 that?

20 A. I understand it.

21 Q. Okay. Well, sometimes we ask this -- not a real --
22 real world question, but we ask it anyway. If you had to vote
23 right now, how would you vote?

24 A. I have no knowledge of the case, so I wouldn't be
25 able to answer that for you.

1 (Recess.)

2 THE COURT: All right. The next person,
3 Elizabeth Rodriguez, right? All right. Let's bring her in.

4
5 VENIREPERSON NO. 96,
6 ELIZABETH RODRIGUEZ,
7 VOIR DIRE EXAMINATION

8 BY THE COURT:

9 Q. Hi.

10 A. Hello.

11 Q. All righty. Okay. I'm bringing you in because we're
12 picking a capital murder jury, okay? And we need to talk about
13 some stuff. First of all, we're looking for people who can
14 keep an open mind. Is that you?

15 A. I consider myself open-minded.

16 Q. Okay. Well, some people say because maybe I, you
17 know, seen some stuff about this in the news or whatever, or
18 whatever reason, some people just aren't open-minded. But if
19 you are, that's fine. If you think you're fine. In fact, I
20 don't think you've seen anything about this?

21 A. No, I haven't.

22 Q. Okay. All right. The next thing we need to talk
23 about the law. We need to make sure that all of our jurors can
24 follow the law; otherwise, it's not fair, okay? Now, let's see
25 here. You've never been on a criminal case before. That's

1 Q. Okay. We got two answers to that question. That's
2 one of them, and the other answer is, I have to vote not guilty
3 because I haven't heard anything.

4 A. Okay.

5 Q. That's really the correct answer. But that's not a
6 real world example. A real world example is State puts on
7 their case, and you don't think they've met their burden, you
8 start him off innocent, they haven't gotten past their burden,
9 what do you do?

10 A. Unless he's proven guilty and that all elements of
11 accusation have been proved, he's gonna be found not guilty.

12 Q. Okay. I had a juror just the other day, Friday
13 night, saw him at a wedding and he said, "You know, I was a
14 juror in your court a few weeks ago and we tried -- we had this
15 trial, and you know what, we thought the guy was guilty, but we
16 didn't think they proved their case beyond a reasonable doubt."
17 Let's talk about that because that's the burden of proof,
18 beyond a reasonable doubt.

19 What it's not, it is not 51 percent. That's
20 what we do in a civil case. A civil case, let's say that --
21 let's say this wasn't a criminal case. Let's say that we got a
22 company suing another company over a contract, okay? The
23 plaintiff would have the burden of proof, but it's just by
24 preponderance of the evidence. If you can think of the scales
25 of justice, it would just tip the one side ever so slightly.

1 This is higher than that.

2 But the next burden we have on the law is clear
3 and convincing evidence, and that sounds pretty strong to me,
4 quite frankly, clear and convincing, right? You agree?

5 A. I agree.

6 Q. That's the kind of evidence you would need if the
7 State was trying to terminate your rights as a parent because
8 maybe the State is alleging that you're not a good parent. So
9 they try to take away your child, but they don't just get to
10 pull your child. They have to prove it to the jury by clear
11 and convincing evidence, okay?

12 This is higher than that. It's beyond a
13 reasonable doubt, higher than clear and convincing. It does
14 not have a definition. On the other hand, it is not beyond all
15 doubt, okay? Beyond all doubt would only be possible if you
16 were a witness, and you saw the whole thing yourself, right?

17 A. True.

18 Q. Okay. But if you saw the whole thing yourself, you
19 couldn't possibly be a juror. You'd be a witness. And you
20 would be disqualified from being a juror. So it's not
21 preponderance, it's not clear and convincing. It's beyond a
22 reasonable doubt, but it's not beyond all doubt, okay? And I
23 think the most important word in that phrase is "reasonable,"
24 beyond a reasonable doubt. Would you hold the State to the
25 burden of beyond a reasonable doubt as the law requires?

1 if he doesn't testify, you know, I'm gonna -- those are going
2 to be points against him. I think there's lots of reasons why
3 somebody may not want to. Maybe his lawyers advised him not to
4 because they think the State hasn't proven their case. Maybe
5 -- I had a friend once who would laugh inappropriately when he
6 got nervous. It used to really offend people, but, you know,
7 maybe he's that type of person. Some people just melt down
8 under pressure, and maybe his lawyers think even if he's not
9 guilty, that maybe if he gets on the stand he'll give the wrong
10 impression to the jury, okay? There's lots of reasons. The
11 point being I need to know. And if you would hold it against
12 him, that's fine; but I need to know if you would hold it
13 against him if he chose not to testify?

14 A. I would not.

15 Q. Okay. Now, let's talk about the allegation. The
16 allegation is capital murder, okay? What is capital murder?
17 Well, it's certainly murder because it's within -- it's within
18 the word. And murder, of course, is the intentional taking of
19 the life of another. Capital murder -- the capital part means
20 the death penalty is a possibility. And the legislature has
21 laid out a list of circumstances where murder becomes capital
22 murder. Murder plus something else. In this case, the State
23 is alleging there's a murder plus a robbery, okay, together.
24 So you got two serious felonies. The legislature says if you
25 mix those two serious felonies, you put them together, then the

1 A. Yes.

2 Q. Okay. Now, the law says since the State's got the
3 burden of proof, defense doesn't have to do anything. In other
4 words, they can really just sit on their hands the rest of this
5 trial. The State presents their evidence. They do nothing.
6 There was once a guy who fell asleep, a defendant. The jury
7 acquitted him anyway. He doesn't have any burden. The State
8 can't make their burden and, you know, they don't get there.

9 And as part of that, the defendant doesn't have
10 to testify, okay? The Constitution says defendant does not
11 have to testify. The defendant does not have to put on
12 witnesses or evidence on his behalf. But it's even stronger
13 than that. But the -- the law says the jury can't hold it
14 against him. In other words, when you go back to deliberate,
15 you can't say, "Hey, we got the State's evidence, and I'm gonna
16 consider that. What did the defense do? Well, they didn't do
17 anything. Well, that goes in favor of the State." Okay.

18 A lot of people say, "Well, I have to hear both
19 sides of the story." Okay. This isn't a race. This isn't a
20 race who gets to the finish line, the State or the defense.
21 This is only a race to see if the State gets passed the
22 finished line, which is beyond a reasonable doubt proof to the
23 jury, okay? Are you following me?

24 A. I'm following you.

25 Q. What I need to know -- because some people would say,

1 death penalty is a possibility. It's a capital murder.

2 Now, what's a robbery? It's not when someone
3 breaks into your house when you're not there. Some people
4 think it is. It's the -- it's the forcible taking of property
5 from another either by the use of threats or by the use of
6 force. For example, if I came and I held you up with a gun and
7 said, "Give me your purse," and you gave me your purse, that's
8 a robbery because I took your purse by threatening your life,
9 okay?

10 Let's talk about something else. What if I --
11 what if when you weren't looking I ran off with your purse?
12 It's not a robbery; that's a theft, okay? Let's say -- let's
13 say I came up to you and I put the gun to you and I said, "Give
14 me your purse." And really you weren't carrying a purse at
15 all. You were going bowling, and what you had in the bag was a
16 bowling ball, and you hit me on top of the head and knocked me
17 out, okay. That would be an attempted robbery because I didn't
18 get what I wanted, okay?

19 The law -- in this case, the State has alleged
20 that the defendant on the given date, in Nueces County, Texas,
21 committed a murder while in the course of robbing the victim
22 or attempting to do so, okay? So they can get there either
23 way. The robbery doesn't have to be complete, but they do
24 have to prove robbery or attempted robbery in a murder
25 results. Do you follow me?

1 A. Yes.

2 Q. Okay. That's how they get there if they can get
 3 there. That's the charge. In Texas we have a bifurcated
 4 system. What does that mean? That means there's two parts.
 5 The first part, guilt or innocence. Can the State prove beyond
 6 a reasonable doubt the defendant's guilty of capital murder?
 7 The State will present their case. Maybe the defense presents
 8 something and maybe they don't, okay? But in any event, you
 9 listen to everything presented to you if you're on this jury,
 10 and you go back and you deliberate with the other 11 jurors,
 11 okay?

12 Jury then finds the defendant guilty or not
 13 guilty. If the defendant's found not guilty, we go home. If
 14 the defendant's found guilty, we go to the second part, the
 15 punishment phase.

16 All right. What is the possible punishment to a
 17 capital murder? There's only two: Life imprisonment or the
 18 death penalty. Okay. Only two possible things that can happen
 19 if someone's found guilty of capital murder. But the jury
 20 doesn't go back and deliberate and say, all right, let's take a
 21 vote, it's life, or let's take a vote, it's death. It doesn't
 22 work like that. You answer questions. Here's the first one
 23 right up here. If you'll take a look with me. "Is there a
 24 probability that the defendant would commit criminal acts of
 25 violence that would constitute a continuing threat to society?"

1 video games, jewelry, everything he can sell, okay? He sells
 2 it, uses the money on cocaine and hookers, okay, just blows it.
 3 And they finally catch him.

4 The second guy found guilty of burglary, but
 5 it's a different situation. This person had a job for 20
 6 years, lost his job because, through no fault of his own, the
 7 company downsized because the economy was bad, struggled for a
 8 few months, and finally ran out of money, okay? He's got three
 9 children, and they're hungry, and they don't eat for a few
 10 days. This person doesn't break into a house, but goes through
 11 an unlocked door, takes only food, goes back, feeds the kids.
 12 He's hungry too, but he doesn't eat because he wants the kids
 13 to eat. All right. Those two people do not have the same
 14 personal moral culpability; you'd agree with me?

15 A. I agree.

16 Q. Okay. Personal moral culpability. That's what
 17 that's about, okay, personal meaning the person's moral values,
 18 culpability, guilt, blameworthiness. They don't have the same
 19 blameworthiness, okay? That's what you have to consider. It's
 20 one of the things they want you to consider.

21 So after considering circumstances of the
 22 offense, his character, background, personal moral culpability,
 23 is there sufficient mitigating circumstance or circumstances to
 24 warrant life imprisonment rather than the death sentence?

25 Okay. Mitigating circumstance. All right.

1 All right. What does that mean, is it probable -- is it more
 2 likely than not that the defendant would be violent with people
 3 in the future? That's essentially what that means, okay? All
 4 right. And the jury would then answer that yes or no.

5 All right. And you'd answer Special Issue 2
 6 it's over your right shoulder there. "After taking into
 7 consideration all of the evidence, including the circumstances
 8 of the offense --" what's that? Well, that's the -- that's the
 9 first part case. Okay. The guilt or innocence phase, -- the
 10 defendant's character and background." What's character? Is
 11 he an honest person, a dishonest person? Is he a liar? A
 12 cheat? Stand-up guy? Okay. Character, the kind of person
 13 that he is, his background. What's that? Well, his childhood,
 14 how he grew up. Maybe he had some military service. Was he a
 15 good kid in school, that kind of thing, you know, his whole
 16 life basically, how he -- you know, how he was raised. All
 17 right? That's that. You consider that.

18 Next thing, the personal moral culpability of
 19 the defendant. Okay. That's that one with the third dot next
 20 to it. That's lawyer talk, okay? That's legalese. But I like
 21 to explain it like this. I explain that as an example. Let me
 22 give you an example. Two defendants are found guilty of
 23 burglary, okay? The first defendant breaks into a house, kicks
 24 in the door, just trashes the house, pulls everything out,
 25 takes everything of value, TVs, VCRs, CD player, computer,

1 What does that mean? Mitigating meaning to lessen, okay?
 2 Lessening circumstances. Okay. Let's say you hear the
 3 punishment phase, you hear about his background. And one of
 4 the things you hear is that he's a war hero. He went to Desert
 5 Storm and he saved -- he was very courageous one day and saved
 6 20 soldiers' lives and risked his own to do it, okay? You
 7 might think, that's a mitigating circumstance, all right?
 8 Maybe he was an Eagle Scout. Maybe he was a great kid in
 9 school. Maybe he taught children to read in his spare time for
 10 free, okay? All of those things can be mitigating
 11 circumstances.

12 Now, does it excuse him for the crime? No. You
 13 found him guilty. I'm not saying it's an excuse for the crime.
 14 It's just like that other person, those other two guys, they're
 15 both found guilty of the burglary, but the punishment probably
 16 wouldn't be the same. You'd agree, right?

17 A. I agree.

18 Q. Okay. Same thing here. So what you need to do is
 19 examine, consider everything, and determine what are mitigating
 20 circumstances. Maybe you believe the war hero part is a
 21 mitigating circumstance, but you think the Eagle Scout thing is
 22 not, okay? These lawyers will suggest to you what is a
 23 mitigating circumstance or an aggravating circumstance, maybe
 24 something that makes things worse. Maybe a criminal history.
 25 That would be an aggravating circumstance, if he had bad

1 criminal history before he did this, okay? Maybe he's got no
 2 criminal history. That could be a mitigating circumstance, all
 3 right? The point is this: Only the jury decides what is a
 4 mitigating circumstance, okay? They get to decide, not these
 5 lawyers, not me. The jury decides what is a mitigating
 6 circumstance.

7 Okay. Then you have to decide whether all of
 8 these mitigating circumstances are sufficient to warrant life.
 9 So you may say, you know what, that deal about him being a war
 10 hero and saving 20 lives, yes, that's a sufficient mitigating
 11 circumstance, but it's not sufficient to warrant life rather
 12 than death, or maybe it is sufficient to warrant life rather
 13 than death, taking into consideration that plus other
 14 mitigating circumstances that I have heard. Do you follow me?

15 A. I'm following you.

16 Q. Okay. That's the answer that the jury would have to
 17 give yes or no, okay? After taking all that stuff into
 18 consideration. This question says take everything into
 19 consideration and then make your decision, okay?

20 Now, when a trial begins I always swear the jury
 21 in, and I always tell them, Do you swear that you will render a
 22 true verdict based upon what, the law and the evidence
 23 presented to you? And they say yes. The reason I bring this
 24 up to you now is I need to know whether you can take that oath
 25 in this case. And before you answer some people tell me,

1 of the stuff the judge talked to you about and ask you some
 2 more questions too. And I guess the first question I'm going
 3 to ask you is -- well, first I've got to let you know is that
 4 there really aren't any right or wrong answers about what I'm
 5 asking you right now. This is just the only chance that you
 6 and I get to talk to each other. If you do get selected to be
 7 on the jury, we can't have any contact at all. So this is the
 8 one chance I get to ask you questions and see kind of how you
 9 feel about stuff.

10 And the first thing I want to know is how did
 11 you feel as soon as you walked in that door downstairs and you
 12 saw all those people and you figured out what kind of trial you
 13 were sitting on? Were you nervous? Were you excited? Were
 14 you scared?

15 A. I honestly didn't have any feeling at all. I was
 16 just accepting what was presented to me.

17 Q. Okay.

18 A. It's a new experience, I have to be honest. I've
 19 never had to serve on a jury, and being asked about how I felt
 20 about capital murder, and I have never given it a second
 21 thought until I was asked on the documents I had to fill out.

22 Q. Okay. Some people who were sitting there, you can
 23 kind of see them go through their different mental processes
 24 and some people just totally freak out. And, you know, they
 25 say, oh, man, I could never possibly do something that would

1 Judge, I cannot take your oath. Why? Because I cannot
 2 participate in a process that could lead the death penalty. I
 3 can't -- I can't take your oath to answer these questions
 4 truthfully. The other person may say, "Yeah, I can give him a
 5 fair trial on the first part, but if I find him guilty of
 6 capital murder, this is nonsense to me. I'm not gonna follow
 7 your law. I'm going to answer these questions so that every
 8 time he's gonna get the death penalty regardless of what comes
 9 forward, and I'm not even gonna consider it." All right.
 10 Neither of those people can follow the law. Neither of them
 11 can take the oath because they can't answer the questions
 12 truthfully, okay? I need to know from you, can you take that
 13 oath?

14 A. I can take the oath.

15 THE COURT: All right. Mr. Skurka.

16 MR. SCHIMMEL: Your Honor, may I do this?

17 THE COURT: You may. Mr. Schimmel.

18 MR. SCHIMMEL: Thank you, Judge.

19 VOIR DIRE EXAMINATION

20 BY MR. SCHIMMEL:

21 Q. Hi, Ms. Rodriguez, my name is George Schimmel. I'm
 22 one of the prosecutors here. This is Mark Skurka.

23 MR. SKURKA: Hi.

24 A. Hi.

25 Q. (BY MR. SCHIMMEL) I just want to follow up with some

1 end up, you know, ending the life of a human being. Other
 2 people say, man, sign me up; when do I start. How did you feel
 3 about being in that position, about possibly having to make
 4 that decision?

5 A. It's a little hard to have to determine that
 6 someone's life should end, but it's not always gonna be the
 7 lethal. You also have the option of life imprisonment. So if
 8 it's something that it's his sentence, then it's to be
 9 accepted.

10 Q. So what you're saying is that if -- if the evidence
 11 supported it and you felt like it was necessary, you could do
 12 it?

13 A. Yes.

14 Q. Okay. And you could also -- if the evidence wasn't
 15 there or you felt like that justice demanded, you could do
 16 something else also?

17 A. Yes.

18 Q. Okay. I know that you have a couple of -- or
 19 actually have three children, and at some point after this
 20 trial, if it turns out that you do find this defendant guilty,
 21 the State's going to be asking for the death penalty in this
 22 case, and it's -- it's not -- we're not asking for the death
 23 penalty of some person who you've never seen before. It's
 24 actually that person sitting right there. And I'd like to ask
 25 you just to -- I think you did take a quick look at him and

1 tell me if you think that that's actually something you'd be
 2 able to do. Some people when they're faced with it like that
 3 just don't think it's something they could do.

4 A. I feel I could do it.

5 Q. Okay. I think the judge explained to you why this is
 6 a capital case, and it seems like you understand that pretty
 7 well. It's kind of strange that not every murder is capital.
 8 It's kind of strange how it all works out like that. But if
 9 you cut up your husband and you buried him in the backyard, and
 10 you invited all your friends over for a party because you were
 11 so happy he was gone, as horrible as that might be, that
 12 wouldn't be capital murder. So it's not just a really bad
 13 murder, like a lot of people think. It's a murder, and then
 14 like the judge was saying, something else, a murder in this
 15 case plus robbery, but it could be plus a rape. It could be
 16 maybe a kidnapping, burglary. It could be killing a child
 17 under the age of six. I mean, there are a number of things --
 18 not a lot -- but a number of things that would actually
 19 constitute a death penalty type case.

20 Do you -- do you agree with that? I mean, do
 21 you think that it's okay that the State has this kind of law?

22 A. Yes.

23 Q. If you were the person who makes the laws in Austin
 24 for the State of Texas, and this law came up for a vote, do you
 25 think you would be one of the people who voted for it to

1 punishment part of the trial.

2 Now, in a lot of cases, like probably almost any
 3 other case you could have been called for, it's either up to
 4 the jury or judge to decide a number of years a person's going
 5 to spend for a crime to commit. If a person came in for a DWI
 6 or for a burglary of a habitation, breaking into a house, and
 7 you found him guilty, at that point you would sit down with the
 8 other jurors and say, "Okay, what's the right number for this
 9 case?" But here, you don't do that. And it's actually -- it's
 10 very different from any other kind of criminal case because
 11 once the jury finds guilt, then they answer these two special
 12 issues the judge was talking about. In answering those issues,
 13 that's pretty much what determines whether the sentencing
 14 should be a life sentence or a death sentence. And I want to
 15 go over some of the things with you a little bit because I
 16 know that some jurors have had some questions about some of the
 17 language on some of these things, and I just want to make sure
 18 that -- I guess that you don't.

19 The first one, this is what happens after you
 20 would have already found the defendant guilty. Then you go
 21 back and you start this part and you -- the first thing you do
 22 is that Special Issue No. 1 right behind you. And it's asking
 23 you if there's a probability that the defendant would commit
 24 criminal acts that would be a threat to society. Okay. The
 25 first question is about that word "probability." What does

1 continue the death penalty or against it?

2 A. For it.

3 Q. Okay. Why do you think that you feel that way?

4 A. There has to be a reason why it was initiated in the
 5 beginning. It's not something that was just blown out of
 6 nowhere. There's reasoning behind it, and it's just not one
 7 vote that brings it forth. It's going to be plenty of people's
 8 votes. It's a high voting -- it's not just one person's
 9 thought, look, I want the death penalty. It's gonna be a large
 10 amount of people that are feeling that way.

11 Q. Well, that's true. But let's say that everybody's
 12 supposed to toss their vote into a hat. Which way would you
 13 vote? I mean, do you think we ought to keep it or do you think
 14 that we ought to do away with it just like in some states go to
 15 nothing but life imprisonment in this kind of case? Or, do you
 16 not really have any feeling either way?

17 A. I honestly don't have a feeling on it.

18 Q. Okay. Like the judge was telling you, this kind of
 19 trial has two parts. There's the part in the very beginning
 20 where a juror decides the guilt or innocence of the person
 21 accused. And after that, there's the punishment part of the
 22 trial. For the guilt/innocence part, you hear evidence, and
 23 basically then the jury will make a decision and come out. If
 24 the jury decides that a defendant is guilty, it's only at that
 25 point that you get to the second part of the trial, the

1 that mean to you?

2 A. Probability means is it gonna be habitual that he's
 3 done this repeatedly, or is it something that was an isolated
 4 incident? Is there a probability of him committing it again
 5 because it's habitual or is it isolated; was it just the
 6 one-time experience?

7 Q. Okay. So what you're saying is those are the things
 8 you look at to determine whether or not there was a
 9 probability?

10 A. Yes.

11 Q. But even more basic than that, what does the word
 12 "probability" mean? Does it mean 100 percent certainty?

13 A. No.

14 Q. Okay. Is there any way that if you were picked as a
 15 juror you could tell whether or not somebody was 100 percent
 16 certain to do something?

17 A. No.

18 Q. Okay. I mean, you're not -- you're not God. You
 19 don't see the future. You don't have a crystal ball. The only
 20 issue about that word "probability" is that it means basically
 21 more likely than not, like not 50/50, maybe a little bit more,
 22 like maybe 51. The probability that a person's gonna commit
 23 criminal acts, now that's another issue. Some jurors say,
 24 "Well, you know, I don't think that this guy is gonna go out
 25 and do more capital murders. I mean, I think he's kind of

1 learned his capital murder lesson. He might not even murder
 2 again." But the issue isn't whether or not they're gonna do
 3 the same crime again. It's whether or not they're gonna commit
 4 criminal acts. Can you -- can you think of anything that would
 5 be a criminal act?

6 A. For that individual?

7 Q. No, no, just in general. I mean, what's a criminal
 8 act?

9 A. Okay.

10 Q. How about -- how about beating somebody up?

11 A. That would be an assault.

12 Q. Yeah. I mean, that's a crime, right?

13 A. Yes.

14 Q. What this Special Issue No. 1 is saying is that if
 15 it's a greater than 50/50 chance that a defendant is going to
 16 commit criminal acts, not of the most heinous, egregious,
 17 terrible kind, just if they're gonna go out and basically
 18 commit crimes, that's what it's asking. And do those crimes
 19 constitute what it says there, a continuing threat to society?
 20 Now, some jurors have issues with that because they say, "Well,
 21 look, man, if this guy's just put in a box somewhere with, you
 22 know, if we look him up and throw away the key, well, I mean,
 23 that's not society, right? That's just -- that's a prison. He
 24 can't hurt anybody in prison." And it would be nice if that
 25 were true, but tell me, who else is in a prison?

1 acts in the future, you say yes, and you go to Special Issue
 2 No. 2. And really, that's the mitigation question which
 3 really, like the judge was saying, just means to make less, to
 4 lessen, to make softer, to -- to lessen. And it's asking --
 5 you've heard everything in the trial, and I imagine that you
 6 might hear other evidence after the trial, and you take all
 7 that into account and you say to yourself, is there anything
 8 I've heard that would cause me not to give a death sentence,
 9 but instead to pull back and to only give a life sentence?
 10 Like the judge was saying, we can't tell you what it is. It's
 11 kind of up to you to figure out what it would be, but the only
 12 issue is whether or not you can sit here right now and say,
 13 yeah, I could consider other things that could possibly lessen
 14 or even could possibly, you know, not lessen. I mean, my mind
 15 is open to those things.

16 Like the judge was saying, I mean, if a person
 17 helps a guy -- helps a little old lady cross the street a lot,
 18 that could be a mitigating circumstance. That could lessen it.
 19 You could say, well, you know, yeah, maybe this thing was
 20 pretty bad but, I mean, shoot, he does help this little old
 21 lady cross the street every Thursday, so that's a good thing,
 22 right? Or you could say, Well, I don't care about that at all,
 23 it doesn't affect me that he's nice to little old ladies. Do
 24 you see where I'm going?

25 A. Yes.

1 A. There's gonna be other inmates.

2 Q. Okay. Inmates. Who takes care of the inmates?

3 A. There's gonna be the guards, the personnel.

4 Q. Guards, the personnel. What about the people that
 5 feed the inmates?

6 A. The workers.

7 Q. The workers, right, maybe the warden, maybe the
 8 warden's staff, maybe people who come in like health
 9 professionals who take care of people. So it's not like --
 10 it's not really like it's just a box somewhere where that
 11 nobody can go in or out. I mean, we're talking about a place
 12 where really there are people. I mean, that's a society. So I
 13 just want to make sure that we're kind of on the same page on
 14 that one.

15 A person could be a continuing threat to society
 16 even if they were only in prison. Do you -- I mean, are you
 17 with me on that or do you disagree?

18 A. I understand you.

19 Q. Okay. Now, if you were on the jury and you already
 20 found the defendant guilty, and you went over the Special Issue
 21 No. 1, and you answered no, you would have said, no, I don't
 22 think there's a chance he's gonna do more bad stuff in the
 23 future. No. You're done. But if you think that there is a
 24 chance, then you go from Issue No. 1, and then you consider
 25 Issue No. 2. So if you do think he's gonna commit criminal

1 Q. So, I mean, would you be able to consider mitigating
 2 circumstances?

3 A. I would be able to consider mitigating circumstances.

4 Q. Okay. Now, if you heard all the evidence and you
 5 believe that evidence beyond a reasonable doubt, could you
 6 return a verdict of guilty? I mean, the law says you have to
 7 do that, but I'm just making sure that you can follow the law.

8 A. I can follow the law.

9 Q. And if you heard all the evidence, and it didn't
 10 convince you beyond a doubt, can you return a verdict of not
 11 guilty, like the law says you have to?

12 A. Yes.

13 Q. And if the State puts on evidence about these Special
 14 Issues No. 1 and No. 2, could you consider in certain
 15 circumstances that a life sentence might be appropriate based
 16 on the evidence that you've heard?

17 A. Yes.

18 Q. And could you also consider based on the evidence
 19 that you heard, possibly, that a death sentence would be
 20 appropriate?

21 A. Yes.

22 Q. Okay. I'd like to talk to you -- I just need to
 23 cover some things with you really quick. The first thing is
 24 the indictment. Do you know how that indictment process works
 25 and what a grand jury is and all that stuff? I mean, you've

1 never been on one, right?

2 A. No.

3 Q. Okay. Basically if a cop arrests somebody, they
4 present a case to the DA's office, and the DA's office presents
5 it to a grand jury. And it's the grand jury's role -- it's a
6 group of people, about 12 of them, who just decide whether or
7 not the police officers have enough evidence to file that case
8 in the first place. That's all it is. Did the cops have a
9 reason to file charges? That's not the same thing as whether
10 or not somebody's guilty. So the law says that a juror can't
11 say that just because somebody got indicted, that they're
12 probably guilty because it's a different -- it's a different
13 standard. I mean, are you okay with that?

14 A. I understand that.

15 Q. Okay. And other thing is the Fifth Amendment, but
16 really all that means is the defendant doesn't have to testify.
17 There are -- like the judge was saying, there are many reasons
18 why a person would choose not to testify. They could not want
19 to, either their lawyers are advising him not to; they might
20 get really nervous in front of a lot of people, maybe they
21 sweat. Like the judge was saying, there could be a lot of
22 reasons why somebody wouldn't want to testify. And what the
23 law says is that you actually can't hold it against him. And,
24 in fact, you can't even talk about it. And it's a weird
25 situation to be in. For a juror, it's almost like hearing a

1 like, well, he's really young, and I feel sorry for him, you
2 know, or, well, he looks like -- he looks like my husband's
3 cousin or something like that. I mean, it has to be a reason
4 based on the evidence. So the issue is, do I have a doubt?
5 And if you don't, he's guilty. And if you do, you ask
6 yourself, do I have a reason for the doubt? And if you have a
7 doubt, but you don't have a reason for it, you still vote
8 guilty because that's not a reasonable doubt. Do you have any
9 questions about that?

10 A. No.

11 Q. You heard the judge talk about the presumption of
12 innocence. What that means is that at this point you presume
13 the defendant to be innocent, and there's no reason why you
14 wouldn't. I mean, you haven't heard any evidence yet, right?

15 A. No.

16 Q. Like the judge was saying, if you had to vote right
17 now, have you heard -- have you heard our side put on anything
18 at all? I mean, have we put on evidence? Have we called in
19 witnesses?

20 A. Have you called any witnesses now? Is that what
21 you're asking me?

22 Q. Yeah. Have you heard --

23 A. No.

24 Q. You haven't heard us call witnesses, though, right?

25 So there's no reason why you would not presume the defendant to

1 joke, but there's not a punch line to it, you know? And no
2 one's saying don't want to know what the punch line is. No one
3 is saying that, but what everybody is saying is, don't hold
4 that against the defendant if for whatever reason he doesn't
5 testify.

6 A. And I'm understanding that's his right?

7 Q. Yeah, exactly, that's his right. Would you be okay
8 with that too?

9 A. Yes.

10 Q. Okay. The judge talked to you about what standards
11 of proof are, about how there's like the standard of proof in a
12 civil case, not this kind of case where it's just a little
13 bit of -- basically a little bit of convincing. And this --
14 this is a lot different. This is called beyond a reasonable
15 doubt. And there's not a definition of that. There's not
16 really a definition of what that means. But I can tell you a
17 good way to think about it is like this. You hear all the
18 evidence, and the first question that you ask yourself is
19 you're thinking about whether or not the defendant's guilty.
20 And you say, Well, do I have a doubt? If the answer is, no, I
21 don't have a doubt, well, you're done. You vote guilty, you go
22 to the next part of the trial. But let's say that you do have
23 a doubt. The next question you ask yourself is, is it a
24 reasonable doubt? Do I have a reason for it? And it's got to
25 be a reason that's based on the evidence. It can't be a reason

1 be innocent. It's almost like a little bubble, like a force
2 field or something around somebody. And if you hear evidence
3 that convinces you that a defendant is not innocent, it pops
4 the bubble and it's gone. It's just -- it means that going
5 into this right now, you have to presume the defendant is
6 innocent. It doesn't mean that he is. It means that going
7 into the trial and deliberating in the trial, you have to
8 assume that he is until you hear evidence that convinces you
9 that he's not.

10 A. I understand that.

11 Q. Okay. Do you have any problems with that?

12 A. No.

13 Q. Okay. I want to talk to you just a little bit about
14 your questionnaire. What is Valence?

15 A. It's a third party administrator company.

16 Q. Oh. Okay. So do you --

17 A. For health insurance.

18 Q. Yeah. How long have you worked there?

19 A. Two years.

20 Q. Are you -- do you go to the health fairs down here at
21 the county? Are you ever down there?

22 A. No. I personally don't. Maybe Driscoll Hospital
23 does because we're affiliated with the state program, Driscoll,
24 CHIPS, and Star Medicaid Program. And then we also have a
25 commercial account in Georgia and Tennessee. Because it is a

1 third party administrator we have -- we have the state
 2 contract, and then we also have a commercial account in Georgia
 3 and Tennessee. Plus, I also work -- have a weekend job.

4 Q. Yeah. What's Bojon's?

5 A. Bojon's is a surf shop in Port A.

6 MR. JONES: I'm sorry?

7 THE COURT: It's a surf shop in Port A.

8 MR. JONES: Oh, okay.

9 A. You have to come by there and check it out.

10 Q. (BY MR. SCHIMMEL) Do you have surf boards too?

11 A. Yes.

12 Q. Do you have long boards?

13 A. Yes.

14 Q. Do you have Robert August long boards?

15 A. I don't know what that is.

16 Q. Okay. I'll go by.

17 A. You have to come by this weekend.

18 MR. SKURKA: He's just showing off, Judge.

19 Q. (BY MR. SCHIMMEL) Okay. So you do that on the
 20 weekends and then on the weekdays you do that TPA stuff, the
 21 third party administrator stuff?

22 A. My full-time job is with Valence. And then my
 23 weekend job is at Bojon's because I'm the sole provider of my
 24 three children.

25 Q. Is it a -- would it be hard for you sitting as a

1 Q. Okay. You just meant you --

2 A. Yeah, it's just the availability of time is not there
 3 for me. It's either my children or work.

4 Q. Okay. You have a cousin also with CCPD?

5 A. Yes.

6 Q. Who is your cousin?

7 A. Two.

8 Q. Who are your cousins?

9 A. Joe Vela. And my other one is distant -- Torres.

10 THE COURT: The commander?

11 VENIREPERSON NO. 96: No. He just started.
 12 He's probably been on the force like two years.

13 THE COURT: Okay.

14 VENIREPERSON NO. 96: Joe Vela's been with
 15 CCPD for a very long time.

16 Q. (BY MR. SCHIMMEL) Do you ever talk to your cousin
 17 Joe about any of these cases?

18 A. We're not actually close because of my lifestyle. I
 19 don't see him quite often.

20 Q. Okay.

21 A. We don't get to visit.

22 Q. Okay. But there's nothing about your being a
 23 relative to Joe Vela or Officer Torres that would make you not
 24 be fair in this case?

25 A. No. I honestly don't even know when the -- when it

1 juror in this kind of case since you have children who are
 2 fairly young and since the defendant himself is fairly young?

3 A. No.

4 Q. I mean, you're not as a juror gonna be thinking, man,
 5 that guy's only five years old or 10 years older than my
 6 16-year-old or anything like that?

7 A. I honestly believe that everything happens for a
 8 reason and everyone's responsible for their own actions.

9 Q. Okay.

10 A. We're all grown-ups. We're not -- we're not a
 11 five-year-old or a 10-year-old.

12 Q. On one of your questions you said that you didn't
 13 participate because of -- because of your work and because of
 14 your being a single mom. But I think that you were talking
 15 about extracurricular type stuff with your church?

16 A. Oh, yes.

17 Q. Okay. Is that what --

18 A. I am -- I am Catholic, but because of my hours and
 19 what I have to do to support my family, I'm not able to have --
 20 I mean, my sole role is my children. So as far as having extra
 21 time to go to church, I'm not able to do that because I'm
 22 always working.

23 Q. Okay. You didn't mean you couldn't be on a jury or
 24 anything?

25 A. No.

1 took place, when this incident happened. I don't know anything
 2 about it. I don't get to watch TV very often.

3 Q. Right.

4 A. So to keep up with that --

5 THE COURT: You're just a real busy person?
 6 VENIREPERSON NO. 96: Yes.

7 Q. (BY MR. SCHIMMEL) It was four years ago. But I guess
 8 the only possible issue would be if maybe, you know, you would
 9 call Joe Torres up and say, Hey, I've got this case, and he
 10 says, oh, here's what you got to do. It's nothing like that?

11 A. No.

12 Q. Okay.

13 A. I don't involve my relatives in certain situations
 14 that would put -- I don't -- there's no lines that I cross. I
 15 know better.

16 Q. Okay. And I know that you -- you do -- you don't go
 17 to church as often as you'd like to, but you are a member of
 18 the Catholic church. Do you know the church's position on the
 19 death penalty?

20 A. I understand it.

21 Q. I mean, I -- my understanding is that the church
 22 disagrees with it, but I'm not completely sure about that. Do
 23 you know if they disagree with it?

24 A. They don't -- they disagree with it.

25 Q. Okay.

1 A. I believe in God. I'm just not able to follow the
 2 religion the way I want to because it's 5:00 in the morning
 3 till 10:00 each day, you know, this is family – this is work
 4 and then family. And on the weekends I work from 8:00 until
 5 7:00. So time for my church is not there for me, not by
 6 choice, but by necessity.

7 Q. Well, what happens, Ms. Rodriguez, if tomorrow the
 8 Pope issues an edict and says, "Everybody who follows Catholic
 9 teachings no longer can believe in the death penalty."

10 A. But this is the law. This is religion. This is the
 11 law.

12 Q. Okay. So man's law is for man; God's law is for God.
 13 Okay. And they're different. Okay. Well, I think I don't
 14 have a lot more questions for you. Do you have any questions
 15 for me?

16 A. No.

17 MR. SCHIMMEL: I'll let the defense attorneys
 18 ask you questions now. Thanks for your help.

19 VOIR DIRE EXAMINATION

20 BY MR. JONES:

21 Q. I'm gonna ask you the questions. My name is Grant
 22 Jones. I wasn't present on the first day when everybody got in
 23 the room together.

24 MR. GARZA: That's why I'm making him do all
 25 the work.

1 eligibility, benefits, what needs to be authorized. As far as
 2 claim processing, I don't do that. We have a different
 3 department that's not even here. It's in Chicago.

4 Q. Okay.

5 A. They do the claim processing. It's run through a
 6 different system. And our corporate office is in Chicago.
 7 It's not here.

8 Q. All right. So you don't get involved in the actual
 9 claims?

10 A. No. The only thing that I view on a claim is after
 11 it's processed, and I'm viewing the information. If there
 12 needs to be any research, I have to send it to get researched,
 13 a request for research.

14 Q. Have you ever testified in a court relating to your
 15 work?

16 A. No. The only – the only court hearings that I have
 17 is child support. That's it.

18 Q. Okay. Well, I noticed that. I'm gonna ask you about
 19 that in a minute.

20 Okay. Now, you've got -- let's see. You've got
 21 three boys?

22 A. I have three boys.

23 Q. Three sons. And let's see, they range in age from?

24 A. Sixteen to seven.

25 Q. Sixteen to seven. And I presume that they're all in

1 VENIREPERSON NO. 94: Yeah, I saw you there.

2 MR. JONES: I carry his briefcase also.

3 VENIREPERSON NO. 94: That could be a weapon.

4 Q. (BY MR. JONES) Your day occupation -- your --

5 A. My full-time job.

6 Q. Your main job, your company processes insurance
 7 claims, right?

8 A. Yes.

9 Q. Do you do any Medicaid work? Do you have federal
 10 government contracts?

11 A. This is a state program. We do Driscoll Star
 12 Medicaid, which is part of Medicaid program, but it's an HMO
 13 policy. So it's the State's way of controlling the misuse of
 14 people who do traditional Medicaid. This is an HMO policy, so
 15 everything has to be reverted back to the primary PCP. People
 16 can't just go and seek services like they would with
 17 traditional Medicaid. Some of them misuse it, so it's the
 18 State's way of controlling that misuse. So if they want to go
 19 see a specialist, they have to go ahead and get referred back
 20 to their primary PCP. They can't just go.

21 Q. I see. So your company -- your job is to watchdog
 22 that and make sure that the rules are followed?

23 A. Well, I'm customer service.

24 Q. Okay.

25 A. So when providers' facilities call in, our -- we give

1 school?

2 A. They're all in school.

3 Q. And I presume that you have someone to help you
 4 with --

5 A. I have family support.

6 Q. Family support for their -- in other words, to look
 7 after them while you're working?

8 A. Yes.

9 Q. Okay. Would that be your family, your immediate --

10 A. My family. And actually my 16-year-old works with me
 11 on the weekends.

12 Q. Okay. So he's --

13 A. He's with me.

14 Q. Almost there. Yeah, he's almost at majority.

15 Does -- and I'm gonna ask you this. It's kind
 16 of a personal question and you'll see the reason for it a
 17 little bit later in our visit here. Let's see, how long have
 18 you been divorced from the father of your children?

19 A. Since 2000.

20 Q. 2000. Okay. So that's been a while back. And
 21 has -- has your ex-husband -- well, obviously he's been --
 22 hasn't been paying his child support?

23 A. No. He's about \$90,000 right now. He just got
 24 released October 31st.

25 Q. All right. So he's not fulfilling his responsibility

1 in that regard. Does he -- since the divorce, has he stayed --
 2 has he been exercising his visitation rights?

3 A. No.

4 Q. Okay.

5 A. When it's convenient to his lifestyle.

6 Q. Okay. Do you think -- I mean, this question almost
 7 answers itself. Do you think it's important for a father of a
 8 child, especially a boy child, to have regular contact with his
 9 son?

10 A. I think it is.

11 Q. And why -- why is that important?

12 A. When the children are born, you don't have choices.

13 Q. Exactly.

14 A. You have responsibilities. That's just how I feel.
 15 Their dad -- he thinks he has choices, and so he exercises
 16 those choices. Yet, I'm the one that carries the
 17 responsibility because I don't get State assistance. I thought
 18 with him being confined in jail would maybe enlighten him and
 19 maybe wake him up, but actually he stayed there 60 days versus
 20 he was not supposed to be out until January. And they gave him
 21 that two day for one credit, so he was out October 31st.

22 Q. Do you agree that one way that children learn what to
 23 do and what the rules are and what -- you know, they pick up
 24 their values from their parents?

25 A. They do. And my boys see me work and they see me --

1 in favor of that option, that punishment option and they have
 2 it for these kind of offenses?

3 A. Yes.

4 Q. And do you believe that the Texas society -- and I
 5 say Texas because the states have the choice to have the death
 6 penalty or not, not all states have it. Do you think Texas
 7 benefits from having the death penalty?

8 A. You know, I really don't have a personal opinion on
 9 it. I haven't really --

10 Q. Thought about that?

11 A. Uh-huh.

12 Q. And that's okay. That's the problem with these
 13 cases, you know, people normally don't think about these
 14 things, you know, in their every day, you know, coffee
 15 conversation. And they really don't -- are forced to think
 16 about it until they get summoned to jury duty. And suddenly
 17 they're asked all these big questions.

18 Well, if you're on this jury, the first -- the
 19 first part of the trial will be concerned with whether the
 20 defendant is guilty of the offense charged in the indictment.
 21 That's the first part or the first phase of the trial. If the
 22 defendant is found guilty of capital murder, then the case
 23 moves to a second phase called the punishment phase where the
 24 jury takes up the matter of punishment. And in this kind of
 25 case, the jury is presented with two questions or special

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1 Q. I know, but if one parent is not there or is not
 2 available --

3 A. He's absent.

4 Q. -- then the children are not getting from that
 5 parent, are they?

6 A. No, they're not. But irresponsibility is not
 7 something that I want them to learn.

8 Q. Do your sons have access to any other male figure in
 9 the family, like your father --

10 A. They have my brothers and my father.

11 Q. Do they have regular contact with them?

12 A. Yes.

13 Q. So those men can be a role model for them?

14 A. Yes. Besides, I keep my boys involved in baseball.

15 Q. Okay.

16 A. Their ROTC, through football. This is where my life
 17 resolves. Not just work, but it's sports.

18 Q. Okay. Now, let's talk about being a juror on a
 19 capital murder case. The death penalty is a form of punishment
 20 that's authorized by the Texas legislature, for certain types
 21 of crimes. The judge told you what they are. They're all
 22 murder, and they're all -- it's not usually. They are murder
 23 plus an aggravated circumstance. Like in this case, the
 24 indictment charges murder in the course of committing a
 25 robbery. Do you -- I think you told us that you're generally

1 issues they call them. An issue is a question. And it is the
 2 answer to those two questions that determines what punishment
 3 will be imposed, okay? The jury doesn't write down --
 4 physically write down on a piece of paper life or death, okay?
 5 Instead the jury answers these questions. And then when the
 6 answer is determined, that is, the statute determines what
 7 follows as a consequence of those answers. Do you follow me?

8 A. Yes.

9 Q. Okay. Let's talk about those questions. The first
 10 one is at your left hand on the board. Would you turn and look
 11 at it and read it.

12 A. Yeah. And I do have neck surgery, so I'm not too
 13 flexible in turning.

14 Q. That's all right. You can spin as much as you want
 15 to up there. Now, that question would be answered based on the
 16 evidence that's before you. Okay. In fact, everything --
 17 every time you vote on something, it's based on the evidence
 18 that you hear in the courtroom. In order for the jury to
 19 answer that question yes, all 12 have to vote yes, a unanimous
 20 verdict, okay? That's generally the rule in criminal cases.
 21 Verdicts require a unanimous vote. However, there's a little
 22 change in the rules in this kind of case. If 10 of the jurors
 23 vote no to Special Issue No. 1, that's a vote that's favorable
 24 to the defendant. Why is it favorable to the defendant?
 25 A. Because no one's voting in one direction. There's a

1 reason --

2 Q. Well, in order -- no one can get the death penalty in
3 Texas unless that question is answered yes. That's a -- it's
4 an indispensable condition.

5 A. By all 12 people.

6 Q. By all 12 people. So a vote no would be favorable to
7 the defendant, right?

8 A. Yes.

9 Q. Because that would mean he would get what punishment?

10 A. He would get the life in prison.

11 Q. That's right, because that condition is not met,
12 correct?

13 A. Correct.

14 Q. Okay. So but if -- when the jury takes its vote, and
15 it's 10 to 2 for no, which is favorable to the defendant, the
16 law authorizes the foreman or the presiding juror to write down
17 the verdict no. And a no answer would -- would also be
18 adjoined with an instruction to stop deliberations and deliver
19 the verdict to the Court who would then, by law, assess a life
20 sentence, okay? You never get to the second question if that
21 one's answered no.

22 Let's assume though for our discussion that the
23 jury does answer the question yes, okay? And you can spin your
24 chair to No. 2, okay? Could you please read that question to
25 yourself and then tell me when you're finished.

1 it effect by voting for a life sentence.

2 Okay. Now, let's talk about -- the question not
3 only asks you to consider whether there are mitigating
4 circumstances that would cause you to vote for a life sentence,
5 but it asks you to consider certain things in getting to that
6 final question. Look up at the -- first of all, what does the
7 verb "to consider" mean?

8 A. To consider.

9 Q. You use the word all the time, but what does it
10 really mean? If I ask you to consider something, what am I
11 asking you to do?

12 A. I am going to have to go ahead and really take it
13 everything and look into it and see --

14 Q. It simply means will you think about it. I'm gonna
15 give you some information. And I say, will you consider this,
16 that is, will you think about it with the view toward doing
17 something that I would like for you to do. I want you to
18 consider the fact that my client was a Boy Scout, okay, with
19 the view towards you would vote for a life sentence. It's
20 really not -- to consider means to think about it with the idea
21 that you're going do something or not do something, okay? Does
22 that -- do you understand that?

23 A. Yes.

24 Q. Okay. I think you do. Okay. All right. So then
25 the question directs the jury to think about three specific

1 A. (Venerperson complies.) Okay.

2 Q. Is there any word or phrase in that question that you
3 do not understand?

4 A. No, sir, it's been fully explained by everyone in
5 court here.

6 Q. That question -- what does the verb "to mitigate"
7 mean?

8 A. To mitigate. We talked about it earlier. Is
9 there --

10 Q. Translate to mitigate into a simple -- into simple --

11 A. Has he done anything in society that benefited it?
12 Has he --

13 Q. The verb "to mitigate" means simply to lessen. If
14 you go to the dictionary and look up mitigation or to mitigate,
15 you'll see the word "lessen," to lessen or make less. In the
16 context of a criminal case when they talk about mitigating
17 evidence and mitigating circumstances, that's evidence which if
18 a juror believes it to be true would cause the juror to want to
19 vote for a lesser punishment.

20 A. And then they're gonna take into consideration as far
21 as his character.

22 Q. Right. Well, I'm gonna get to that. Now, mitigating
23 circumstance -- any fact, you know, of the fact that the
24 defendant, I don't know, was a Cub Scout, you know, if you
25 think that's a mitigating circumstance, you can -- you can give

1 things or areas. The legislature didn't make these up. These
2 areas of consideration are directed by the Supreme Court of the
3 United States. They're saying in a case like this, a jury must
4 think about or consider these matters before it reaches the
5 final decision.

6 Okay. What's the first one up there? The
7 circumstances of the offense. Okay. Well, the jury's already
8 heard that, right? How was the offense committed, the manner
9 of its commission, etc.? The second thing is the defendant's
10 character and background. What does character mean?

11 A. What he's made out of.

12 Q. Hum?

13 A. What is he made out of.

14 Q. If I said you were a person of good character, what
15 am I telling you? If someone asks me, what about this lady, is
16 she a lady of good character?

17 A. Are you honest, are you hardworking? That's
18 character.

19 Q. Okay. Those things that you mentioned are values,
20 are they not?

21 A. But it also builds character.

22 Q. Do you agree that our society has a certain set of
23 moral values that we sort of all agree upon, you know, like Ten
24 Commandments, the Boy Scout oath, the law, trustworthy, loyal,
25 helpful, friendly, courteous, kind, obedient, cheerful?

1 A. That's a perfect world.

2 Q. In a perfect world. But those are good values,
3 right? And so if a person adheres to those values, then we'd
4 say that they have good character, okay? Whereas a person who
5 lies, you know, doesn't meet his obligation, you might say, is
6 a bad character, you know.

7 Now, background. Well, background's pretty
8 easy. What does that mean?

9 A. That's his history.

10 Q. That's his history. Okay. His biography, if you
11 will. And you would expect in this kind of case if we get that
12 far, that you're gonna hear some background. The defense
13 counsel in a capital murder case are directed -- it's their
14 duty to investigate the background of the defendant and to
15 offer that information to the jury, okay, and to argue its
16 significance as to the issue being decided, okay?

17 So if you're on the jury, will you consider the
18 defendant's background regardless of what it is?

19 A. Yes.

20 Q. You may not give it effect, but you may. For
21 example, we may prove that in a case like this that the
22 defendant grew up in a very deprived family.

23 A. But it doesn't justify it.

24 Q. Okay. I'm glad you said that. Let's say that you're
25 on the jury and the defendant puts on evidence that shortly

1 All right. Now, the next one is a little bit
2 harder. Let's go down, personal more culpability. What does
3 that mean? Well, personal means the defendant, and what does
4 moral culpability mean?

5 A. His beliefs, his morality.

6 Q. Okay. But it's asking you to consider it toward the
7 end, that you might use it to vote for a lesser punishment. So
8 when you think about a person's moral culpability, what thought
9 process are you going through? You've done it before, just
10 never have articulated it. Let me see if I can suggest a -- a
11 framework for thinking about it.

12 A. I'm just not to use judging them first without
13 knowing them.

14 Q. Well, let me suggest the framework to think about
15 moral culpability, okay? First of all, our society does have
16 rules, okay? We have laws, and we have moral rules that we
17 learn, you know, through our Judeo Christian traditions, Ten
18 Commandments, Boy Scout Law, the Penal Codes. Those set out
19 the standards of conduct. And we expect and presume that when
20 a -- when a citizen reaches a certain age, that they know what
21 those rules are, okay? You have a son that's 16 years old. In
22 two years he's gonna be an adult for many purposes, and society
23 is going to presume that at that stage that he knows what the
24 rules are, he knows what he's supposed to do and not supposed
25 to do, okay?

1 after he was born his parents abandoned him and he kind of grew
2 up on the street, okay? Just really had a terrible time. He
3 had health problems and, you know, didn't go to -- dropped out
4 of school, etc. And you're thinking about that. Well, you
5 know, this kid didn't really have a good chance. So I -- I
6 consider that to be a mitigating circumstance, and I'm gonna
7 vote for a life sentence. And then the juror next to you says,
8 wait a minute, there are lots of kids that grow up, you know,
9 born into bad situations like this, you know. They don't all
10 grow up and, you know, commit crimes. It's no excuse, okay?
11 What's wrong with that argument?

12 A. Well, I'm gonna have to be open-minded about
13 everything.

14 Q. Okay. Well, when they -- the word "excuse" suggests
15 that it's a defense, okay, with -- the jury gets to this
16 question. You've already found the defendant guilty of the
17 crime, you know, and it -- you know, and you -- the fact that
18 his father beat him or something is not an excuse for
19 committing the crime, okay? It's not a defense. It would
20 cause you to let him go, okay?

21 This kind of evidence is evidence which goes
22 beyond. It's in addition to the decision whether a person's
23 guilty or not guilty. Do you follow me on that?

24 A. Yes.

25 Q. Okay. It's a bigger -- it's a bigger question.

1 So the first component of thinking about moral
2 culpability is does the defendant know what the rules are. Is
3 there anything in his background that would question or raise a
4 question about his knowing what the rules are? For example, if
5 a person has a low mental ability, like is borderline retarded,
6 he's not retarded, but borderline, has a low IQ, that might
7 affect a person's ability to know and understand the rules,
8 right?

9 A. True.

10 Q. But a person -- okay, so -- or did a person grow up
11 in a family where he had access to people who were teaching him
12 the rules, okay? So your children have -- are learning their
13 rules from you, from their grandfather, from their uncles and
14 their teachers. And you take your son out to the marketplace
15 to work, he's learning from the other adults that are around
16 him. He's learning things, right?

17 A. Right.

18 Q. You're giving him opportunities to learn what the
19 rules are and he's learning it. I guarantee you he's learning
20 it. That's the way I learned it. I had a lot of contact with
21 both my parents, I had teachers, ministers and churches, Boy
22 Scout leaders etc., etc., when I was growing up. One day I
23 woke up and I knew what the rules were, okay?

24 Do you believe in the doctrine of free will? Do
25 you know what that means, that human beings have the power to

1 choose one course of action over another?

2 A. Yes.

3 Q. Sometimes preachers talk about free will. In other
4 words, we're free to sin.

5 So, which brings me to the second component of
6 moral culpability, and that is, is there anything that's going
7 on that affects a person's judgment about what course of action
8 they're gonna take? You know, you may know the rules, but in
9 making the judgment to go this way or that way, is there
10 anything going on that would affect a person's judgment? Now,
11 in the illustration that the Court gave you about the two
12 people that did the burglaries, one guy was stealing to support
13 his --

14 A. -- his habits.

15 Q. Okay. So he knows that it's against the law to
16 commit burglary. He knows it's against the law to steal,
17 right? And so, but he made a choice to do that in our
18 illustration. However, he did it for a reason, okay? And that
19 reason affected his judgment in taking one course of action
20 over another. And what was that reason?

21 A. Are you referring to the one that did it for his
22 habits or are you referring to the one --

23 Q. No, no, the one that was feeding his children.

24 A. Okay. That was a survival method. But he should not
25 have reverted to that right there. There's other ways.

1 something that would affect a person's judgment. Intoxication,
2 mental illness, okay? IQ, you know, mental ability might
3 affect a person's judgment. Do you agree with that?

4 A. I understand that. I'm actually a CMA. So running
5 into people who are on medication with different --

6 Q. Okay. There you go. When the question says consider
7 the person's moral culpability, it's basically asking you, did
8 you know what the rules were? Was there anything that was
9 affecting his judgment --

10 A. Yes.

11 Q. -- when he broke the rules? Okay. And if there is,
12 then there is a reason -- then you have to consider that with a
13 view toward giving him a lesser punishment because if you think
14 that's the right thing to do.

15 Okay. Do you think you understand?

16 A. Yes.

17 Q. Okay. Now -- we said that before a person can get
18 the death penalty that Special Issue No. 1 has to be
19 answered --

20 A. By all 12.

21 Q. All 12 how, yes or no?

22 A. Yes.

23 Q. Yes. How does Special Issue No. 2 have to be
24 answered in order to produce the death penalty?

25 A. What do you mean? That, I'm not understanding.

1 Q. There's other ways, but you can understand --

2 A. Honestly, I couldn't see -- I wouldn't understand why
3 he would have take from someone else. I understand he did it
4 for his children. He felt he was doing right for his children,
5 but, you know, we can all work and find different ways. I have
6 personally done a contract for a whole year with my full-time
7 billings job --

8 Q. Right.

9 A. -- doing lawn contractor. I mean, I'm out there with
10 the lawn mower, weed eater. That was what I did. So reverting
11 to stealing from someone else is not just a --

12 Q. So you if were the judge in a case like that, you
13 would tell this guy, say, look, I know your kids are starving,
14 but, you know, you can go down to the welfare department and
15 get some food, or, you know, you could -- you know, there are
16 other ways you could have gotten that food besides stealing,
17 breaking into that person's house?

18 A. Yes.

19 Q. So I'm gonna give you the same punishment as I give
20 this other guy.

21 A. Umm...

22 Q. You paused, right? There's a difference, right? The
23 -- there was -- his stealing to feed his kids is not an excuse
24 for the crime or even a justification for the crime, but it is
25 a way -- that motive affects his moral culpability. It's

1 Q. Okay. That Special Issue No. 2 calls for a yes or no
2 answer, right?

3 A. Okay.

4 Q. Which answer, yes or no, will produce the death
5 penalty?

6 A. Yes.

7 Q. What?

8 A. Yes.

9 Q. Look at it again, especially the last part.

10 A. I'm a little confused on what you want me to answer
11 your question.

12 Q. Well, if the jury finds that there is sufficient
13 mitigating circumstances to justify a life sentence, then they
14 will answer that question yes.

15 A. Okay. But I told you yes, and you --

16 Q. Oh, I'm sorry. I thought you said no.

17 A. No.

18 Q. I apologize.

19 A. I said yes.

20 Q. That's correct. In other words, if the jury finds
21 that there are mitigating circumstances, then they would answer
22 that question yes. I always like to say yes means life. It's
23 a positive. How many votes does it take to get a yes answer on
24 Special Issue No. 2?

25 A. Are we also gonna consider all 12 votes?

1	Q. Remember we talked about --	1	it's gonna go to the judge.
2	A. It would have to be yes.	2	Q. Yeah, with the no answer to number 2. What
3	Q. It has to be yes. That's a vote against the	3	punishment is he gonna -- by law has to be imposed? There's
4	defendant.	4	only two choices.
5	A. Okay.	5	A. It's gonna be either the life imprisonment --
6	Q. But a vote for the defendant on Special Issue No. 2,	6	Q. Or death?
7	how many votes does that take? And what we said is a little	7	A. -- or the lethal injection.
8	alteration to the rules. A vote favorable to the defendant	8	Q. But if you answer Special Issue No. 2 no, what
9	only takes 10. So if 10 jurors feel like that there are	9	punishment is gonna be imposed? The jury's saying there are no
10	mitigating circumstances that justify a life sentence, the	10	mitigating circumstances that would justify a life sentence.
11	foreman of the jury can answer that question yes.	11	A. I'm not sure.
12	A. Okay.	12	Q. You know the answer. I just know you do.
13	Q. Yes will produce what sentence?	13	A. I just got a headache already.
14	A. Life in prison.	14	Q. I know, I know.
15	Q. Correct. If the jury answers no, however, which is a	15	A. You gave me a headache.
16	vote against the defendant, okay, how many votes does that	16	Q. Look, the --
17	take?	17	A. I think I should have been taking down notes.
18	A. If the jury answers no?	18	Q. I know. But both a yes or no -- Special Issue No. 2
19	Q. Right, that's against the defendant, it takes how	19	calls for yes or no answer. We've already -- if the jury
20	many votes?	20	answers it yes with 10 -- at least 10 votes, that's gonna
21	A. I'm not sure.	21	produce a life sentence. That's good. That's positive.
22	Q. Unanimous. Anything against the defendant takes 12	22	That's favorable to the defendant, right? But if the jury
23	votes, okay? General rule in criminal cases is unanimous	23	says, no, there's not any mitigating circumstances that we
24	verdict to get any kind of decision, all right? A vote of no	24	think are important enough to vote for a life sentence, you
25	there means what punishment's gonna be imposed?	25	answer that question how?
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1	A. Life. This one's supposed to be yes in order to get	1	A. So then the mitigating is gonna be to a lesser
2	life in prison.	2	sentence?
3	Q. Yeah.	3	Q. Right. Yeah.
4	A. So how are we gonna get no on this one?	4	A. Is that what you're asking me?
5	Q. If you answer it no. But if the jury answers that	5	Q. Yeah, but if the jury says there are no mitigating
6	no, what punishment is the judge gonna give? What punishment	6	circumstances, then they answer that question how?
7	follows the no answer there? What is the result of the no	7	A. It's going to be the lethal.
8	answer?	8	Q. The what?
9	A. Okay, honestly I'm confused already.	9	A. The lethal injection.
10	Q. All right. I'm gonna do it one more time.	10	Q. Yeah, but what -- what word are they gonna write on
11	A. You turned me in circles.	11	the verdict form yes or no?
12	Q. Okay. I'm sorry. The answers to these questions --	12	A. I'm so confused now. I'm not understanding what
13	both questions call for a yes or no answer. The jury is	13	you're wanting -- what you're asking me.
14	permitted to know the effect of their answers, in which when	14	Q. Okay. I'm just asking you mechanically what
15	you vote a certain way you know what's gonna happen?	15	answer -- what will -- what events will follow if you answer
16	A. Okay. So if this one, if it votes yes, all 12, we're	16	the question in a certain way.
17	going to this level?	17	MR. JONES: Okay. That's all I have.
18	Q. That's right.	18	THE COURT: Anything else?
19	A. Okay. And so when we vote yes on this one, it's	19	MR. SCHIMMEL: Just a few more questions, Your
20	going to be life in prison.	20	Honor.
21	Q. You got it.	21	THE COURT: Okay.
22	A. Okay.	22	VOIR DIRE EXAMINATION
23	Q. So if you vote no on that one, what's going to	23	BY MR. SCHIMMEL:
24	happen?	24	Q. Ms. Rodriguez, I think just basically what Mr. Jones
25	A. Then we're -- you had said the unanimous, and then	25	was asking is, if you find the defendant guilty, the first part

1 of the trial, if you say, yes, he's guilty, then you answer
 2 Question No. 1, and you say, yes, I think he's gonna keep doing
 3 bad stuff. The answer to No. 1 becomes yes, and you look at
 4 No. 2 and say, and no, there's no reason why we should not
 5 impose the death penalty, yes, then no. That's the answer. If
 6 you say yes, and then you say no to that, then that means that
 7 the judge authorizes the death penalty be imposed. That's it.

8 But I just had a couple of quick questions for
 9 you about some stuff that came up.

10 The first one, I was noticing when I was going
 11 through some of this, you said that you had a hot check issue
 12 with that guy trying to pay child support and not paying it.
 13 Did -- did the DA's office -- they helped you with that,
 14 didn't they?

15 A. I ended up having to go to -- because I tried
 16 collecting -- he wrote me like a \$200 check for child support.
 17 Of course, it bounced. And I couldn't collect it from him, so
 18 I ended up having to go to the office down Weber and file it
 19 with them. And it's been such a long time already, I really
 20 don't remember the process of it, but I know you have to send a
 21 certified letter to them, I guess. And finally, his -- but the
 22 DA didn't get involved here.

23 Q. Okay.

24 A. They didn't get involved here at the courthouse
 25 because I know I went there. They couldn't help me. They

1 The subdivision is in phase one right now. It's got like three
 2 phases. Well, the income that I'm getting for each lawn wasn't
 3 enough for me to acquire help, so I actually did at the very
 4 end up with 32 lawns every week. So I'd break it up and I had
 5 my framework, but because of my neck surgery, I wasn't able to
 6 physically keep up with it anymore.

7 Q. Oh, that was what you were talking about what
 8 happened with your neck?

9 A. I actually have severe degenerative disk disease, so
 10 I do have a plate supporting my neck at C5, C6, and C7.

11 Q. But that's when you said your child was helping on
 12 the weekends, that's what he was helping you do?

13 A. No. My older son helps meet right now at Bojon's.
 14 I've been working at Bojon's for maybe the past two and a half
 15 months.

16 Q. Okay.

17 A. And he works with me.

18 Q. Okay. I just wanted to figure that out. One last
 19 question. You said that on the list going over this stuff --
 20 I'm honestly not trying to pry at all. I just wanted to figure
 21 this out. You dropped charges on, I guess, it was your husband
 22 at that time for assault or something?

23 A. Actually, it was my fiance. And he did assault me
 24 six weeks after the surgery. So for six weeks after the
 25 surgery I'm supposed to wear a Miami brace, which is a hard

1 actually directed me to the Flour Bluff constable, I think.

2 Q. Judge Stoner?

3 A. They weren't able to -- they tried. I think they
 4 made attempts. And then I ended up having to go down to the
 5 Weber office, and that's when his sister finally came and paid
 6 the money. And that cleared that check.

7 Q. Do you live out in Flour Bluff or something?

8 A. Yes.

9 Q. All right. I read that. At first, I was thinking,
 10 oh, great, we helped her get her money and then you said he
 11 owed you \$90,000 --

12 A. No. You can help me get \$90,000.

13 Q. Okay. Gosh, that's terrible.

14 The other thing I was going to ask you, you said
 15 you actually cut lawns. That was your third job to take care
 16 of your kids?

17 A. Well, no, actually, before I did this, the Bojon's, I
 18 had a lawn contract with a subdivision out in Flour Bluff. So
 19 it's -- it's Shoreline Oaks and they're just building right
 20 now. But it first started with a job for me and my sons to do.
 21 But then I couldn't have them doing it out there because it is
 22 a lot of physical labor, and I didn't like them using the
 23 machinery. So my job was -- and it was a contract -- I was
 24 supposed to take care of all the lawns, just the front lawns,
 25 and then do like the model homes, the entryway, the pool hall.

1 collar. And Dr. Prekowski is the one that did it. He's the
 2 one that did the surgery. He did come home, and he was
 3 intoxicated, and he did become violent to where I did call the
 4 police. They did go out there. They did bring him in. And he
 5 spent maybe like two nights -- but I dropped the charges. His
 6 family -- when you have the surgery, it actually takes you a
 7 whole year for it to fuse. You're not supposed to run or jump.
 8 His family was very threatening because they were not happy
 9 about him spending the night in jail to where I dropped the
 10 charges. The only thing I wanted to do was get out -- get out
 11 of the home. So I did relocate myself. I did get a
 12 restraining order. And he went through anger management
 13 classes, and we went our separate ways.

14 Q. That's good. Do you feel like -- I mean, I guess a
 15 lot of that stuff happened through this office here granting
 16 the protective order and stuff like that?

17 A. Through the courthouse here.

18 Q. Yeah. Do you feel like -- I guess it did. I mean,
 19 that happens that way in a lot of cases. Do you feel like the
 20 DA's office or the county attorney's office did enough to help
 21 you in that case?

22 A. No, they did. They actually weren't very happy with
 23 me dropping the charges.

24 Q. Okay.

25 A. They said it's actually not up to me. Even though I

1 drop them, the State can still implement them and prosecute him
 2 for it. So my dropping them is not gonna even drop everything
 3 completely. It's up to the State. But they didn't pursue it.
 4 They didn't pursue it. And I just -- he seemed to have learned
 5 his lesson and --

6 Q. Okay. Well, I hope your neck gets better.

7 MR. SCHIMMEL: That's all I have. Thank you.

8 THE COURT: Anything else?

9 MR. JONES: No.

10 THE COURT: Okay. Why don't you wait in the
 11 jury room. We'll be right back with you.

12 (Venireperson exits the courtroom.)

13 THE COURT: All right. What says the State?

14 MR. SKURKA: Could we have a moment, Judge?
 15 (Counsel conferring.)

16 MR. SCHIMMEL: Your Honor, the State will
 17 accept this juror.

18 MR. GARZA: Can we confer a minute, Judge?

19 THE COURT: You may. You may.
 20 (Counsel conferring.)

21 MR. JONES: All right. We exercise a
 22 peremptory challenge. How many is that?

23 THE COURT: It's 12. All right. Bring her
 24 in.

25 (Venireperson enters courtroom.)

1 now and see what the deal is?

2 MR. JONES: Yeah, just maybe ask her the --
 3 you know, this trial can put you under a lot of stress.

4 THE COURT: And then I guess if she says okay,
 5 we'll just go right into her?

6 MR. JONES: If she thinks she can do it, then
 7 we'll tell her go back and question her; or if she says no,
 8 she --

9 THE COURT: I mean, if she says she can do it,
 10 we'll roll on with her, I guess.

11 MR. JONES: Okay. That's fine, yeah.

12 THE COURT: All right. Let's bring her in.

13 MR. SKURKA: But she doesn't answer the
 14 questions --

15 THE COURT: She is 98, that's Contessa Ebanks?
 16

17 VENIREPERSON NO. 98,

18 CONTESSA EBANKS,

19 VOIR DIRE EXAMINATION

20 BY THE COURT:

21 Q. Okay. You are Contessa Ebanks; is that how you say
 22 it?

23 A. Yes.

24 Q. Okay. All right. We're looking to pick a capital
 25 murder jury. You know that?

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1 THE COURT: All right. Ms. Rodriguez, you
 2 were not selected to be on this jury, but we do appreciate
 3 your service and coming down here and spending the good part
 4 of the day with us.

5 VENIREPERSON NO. 96: Well, thank you. Well,
 6 you have to head out to Bojon's on the weekends.

7 MR. SKURKA: Can we go off the record just a
 8 second?

9 (Discussion off the record.)

10 (Recess.)

11 THE COURT: Which person is this?

12 MR. SKURKA: We're looking at No. 98. She may
 13 have medical problems. She says she's doing better, but I
 14 just bring it to your attention.

15 THE COURT: This isn't No. 97, is it?

16 MR. SKURKA: 98, Judge.

17 MR. JONES: What if we called her in --

18 THE COURT: All right. Call her in first.

19 MR. SKURKA: And just let the judge ask about
 20 the medical stuff?

21 MR. JONES: We can just agree.

22 MR. SKURKA: I'll agree on her.

23 MR. GARZA: On which one, on 98?

24 MR. JONES: Yeah.

25 THE COURT: Do you want to bring her in right

1 A. Uh-huh.

2 Q. And we're looking for people that can keep an open
 3 mind and follow the law. Now, we got your questionnaire.

4 A. Okay.

5 Q. Okay. And within your questionnaire, you stated --
 6 and I don't mean to get personal with you, but you did state
 7 that you have -- you had a condition that you were taking
 8 counseling for?

9 A. Oh, yeah.

10 Q. Okay. I guess I need to know if that's going to
 11 affect -- because this is serious deal, okay? It's a capital
 12 murder case. What does capital mean? That means the death
 13 penalty is a possibility. This is serious stuff. And we had a
 14 juror yesterday that said, I just -- you know, I've been up at
 15 nights thinking about this, and I just can't do this, okay?
 16 And if you can't, it's okay. All right. We'll get somebody
 17 else. It won't hurt our feelings at all, okay?

18 A. Yeah.

19 Q. So I need to know. I mean, this is serious business,
 20 and -- and I think even -- even one of the most seasoned
 21 persons maybe that's even been through combat finds this a
 22 stressful situation simply because the fact of the matter is,
 23 this person over here, this process could lead to his death.

24 A. Right.

25 Q. Okay. It may be the most serious decision that you

1 ever make in your life, or one of them. Is that -- do you
2 think you can do that?

3 A. No. I actually have been thinking about it since we
4 had our jury questionnaire. I could -- could come to like, I
5 guess, a decision based on like facts, but, when it comes to
6 the punishment part --

7 Q. And some people tell me that. Okay. All right.

8 THE COURT: Do you-all want --

9 MR. GARZA: No, Judge, we don't have any
10 questions.

11 THE COURT: Okay. Why don't you wait in the
12 jury room and we'll be right back with you.

13 VENIREPERSON NO. 98: Sure.

14 (Venireperson exits the courtroom.)

15 THE COURT: All right. Who's going to make a
16 motion?

17 MR. SKURKA: I'll make a motion to challenge
18 her for cause, Judge.

19 MR. GARZA: No objection.

20 THE COURT: All right. Bring her back in.

21 Sustained.

22 (Venireperson enters courtroom.)

23 THE COURT: All right. Ms. Ebanks, we're
24 gonna go ahead and let you go. Thank you for coming down, and
25 we appreciate your honesty.

1 of all, you haven't heard anything about the case?

2 A. No.

3 Q. All right. Now, this is a criminal case, and the law
4 says in every criminal case, the State brings the
5 prosecution -- in other words, the State brings the charges,
6 the law says, State, you bring them, and you prove them. The
7 defense doesn't have to prove anything. That's how it works.
8 The burden's on the State. You can hold them to the burden --
9 to their burden, right?

10 A. Uh-huh.

11 Q. Yes? You've got to say yes.

12 A. Yes.

13 Q. Because she's punching it out. Okay. Next thing,
14 the burden of proof is beyond a reasonable doubt, and I -- I
15 defined -- there's no definition, but I try to tell the jury
16 what it's not, and that gives you an idea of what it is, okay?

17 A. Okay.

18 Q. In a civil case, like a contract dispute or a car
19 accident case where one party sues another, what would happen
20 was one party would sue another and they would be the
21 plaintiff, and they would have the burden of proof. The burden
22 of proof would be pretty small. That would be preponderance of
23 the evidence tipping the scales ever so slightly, okay?

24 A. Right.

25 Q. It's 51 percent, if you will, okay?

1 MR. SKURKA: Thank you.

2 THE COURT: All right, then. This is Lorraine
3 Leal.

5 VENIREPERSON NO. 97,
6 LORRAINE LEAL,
7 VOIR DIRE EXAMINATION

8 BY THE COURT:

9 Q. Hello.

10 A. Hello.

11 Q. All right. You are Lorraine Leal?

12 A. Yes, sir.

13 Q. All right. We're picking a capital murder jury. You
14 know that from the first day you came in?

15 A. Uh-huh.

16 Q. But what we're looking for is people that can keep an
17 open mind, right?

18 A. Uh-huh.

19 Q. And people that can follow the law, okay? Can you
20 keep an open mind in this case?

21 A. Pretty much, yes.

22 Q. All right. Never been on a jury before. That's
23 okay.

24 A. No.

25 Q. All right. Let's talk about some things here. First

1 A. Okay.

2 Q. The next burden of proof is clear and convincing.
3 What's that? We use it in some civil cases for some special
4 issues, most notably when the State tries to take away
5 somebody's children, take away their rights to be a parent.

6 A. Right.

7 Q. They use the standard clear and convincing. That's
8 higher than that 51 percent, okay, and it's pretty
9 self-explanatory, really, clear and convincing. Pretty strong
10 stuff.

11 A. Yes.

12 Q. This is a higher burden than that. It's beyond a
13 reasonable doubt, and it's higher than those two.

14 Now, it is not so high that it's beyond all
15 doubt because if it was beyond all doubt, you would have had to
16 have been there and been a witness, and that would be an
17 impossibility. You wouldn't be qualified if you were a
18 witness.

19 A. Right.

20 Q. You'd be a juror, okay? So that gives you kind of an
21 idea of what beyond a reasonable doubt is.

22 Do you think you could follow the law and hold
23 the State to their burden on that?

24 A. Yes, sir.

25 Q. Now, the law says, okay, State, your burden to prove

1 it beyond a reasonable doubt, and until you do that, defendant
 2 is presumed to be innocent, okay? All of us. We're all
 3 presumed innocent until the State can prove otherwise if they
 4 can prove otherwise. That's no done deal, okay?

5 I need to know from you whether you could do
 6 that, follow that law, presume the defendant innocent until and
 7 only if the State can prove their case?

8 A. Yes, sir.

9 Q. Okay. And we always ask this question -- it's
 10 somewhat of a fair question, I think, but I'm gonna ask anyway.
 11 What would you have to vote if you had to vote right now?

12 A. I wouldn't.

13 Q. See, that's what -- people answer either that way or
 14 they say not guilty. The right -- the actual right answer is
 15 not guilty, but the fact of the matter is that's not a real
 16 fair question because --

17 A. Right.

18 Q. -- we would never ask anyone to vote before a trial
 19 was presented, okay?

20 Now, I've seen a lot of trials and sometimes
 21 I've seen strong evidence, and sometimes I've seen evidence
 22 that's so minimal, it's even shocking that it was presented,
 23 okay? But the fact of the matter is, if the State doesn't
 24 present enough evidence to prove to you beyond a reasonable
 25 doubt of the defendant's guilt in this case, what would you do?

1 A. If they can't prove, then I do have a reasonable
 2 doubt, it would be a not guilty.

3 Q. Okay. All right. Let's move on to the next thing.
 4 It's part of the same set of things.

5 Okay. The law says this. The law says
 6 defendant doesn't have to testify. Why? Well, it kind of
 7 makes sense because if State always has the burden of proof,
 8 and it never shifts over here, then the defense doesn't have to
 9 present anything, okay? Some people say, "Well, I've got to
 10 hear both sides of the case," you know. No. It's not about
 11 that. This isn't a race to the finish line where the State's
 12 running and the defendant's running and we see who gets there
 13 first. It's not like that. The only race we have here is to
 14 see if the State crosses that line, that burden beyond a
 15 reasonable doubt.

16 The law says he doesn't have to testify, and
 17 it's even stronger than that. It says, not only does he not
 18 have to testify, but you jurors, you can't hold it against him.
 19 If they don't present any evidence, if they just sit on their
 20 hands, and these guys don't prove their case beyond a
 21 reasonable doubt, you can't -- you can't hold that against him.

22 A. Right.

23 Q. Do you follow me?

24 A. Yes.

25 Q. Could you follow that law and not hold it against the

1 defendant --

2 A. Yes.

3 Q. -- if he chose not to testify? Okay. All right.

4 The next thing, let's talk a little more specific about this
 5 case. What is the allegation in this case? Well, the charge
 6 is capital murder. You've been told that.

7 A. Right.

8 Q. And what is that? Well, it's certainly murder
 9 because that's within the phrase, right, capital murder? It's
 10 within the two words. And murder, of course, is the
 11 intentional taking of another one's life, okay?

12 A. Yes.

13 Q. Okay. Capital. What's the capital part signify?
 14 The capital part means the death penalty is a possibility, and
 15 the legislature has said there are certain kinds of murders,
 16 murders plus something else, plus a special circumstances that
 17 qualify, okay? If I, you know, walk right outside with a gun
 18 and I shoot somebody, that doesn't make it a capital murder.
 19 It makes it a murder which is a first degree felony, and it's a
 20 serious offense, but it isn't necessarily capital murder.

21 In this case, what the State is alleging is that
 22 the defendant, on a given day in Nueces County, Texas, while --
 23 while robbing or attempting to rob someone murdered them.
 24 Okay. So we got murder and robbery or attempted robbery in
 25 the -- put together. Okay. That's what makes this capital

1 murder. Okay. That's the allegation.

2 The legislature says if you put those two major
 3 felonies together, robbery and murder, then you've got a
 4 capital murder.

5 Okay. What is robbery? The robbery is the
 6 forcible taking of property from another, either through force
 7 or threats, okay? For example, I come up to you and I hold a
 8 gun to you, and I say, "Give me your purse." And you give me
 9 your purse, I've committed a robbery, right?

10 A. Right.

11 Q. All right. What if I came up to you and did the same
 12 exact thing, said, "Give me your purse." I thought it was a
 13 purse, but really you're an avid bowler, and it's your bag for
 14 your bowling ball, and you hit me over the head with the
 15 bowling ball and knock me out. I don't get to rob you. Am I
 16 guilty of robbery? Well, maybe not, but I'm guilty of
 17 attempted robbery, right?

18 A. Right.

19 Q. They get there either way. In other words, robbery
 20 plus murder, attempted robbery plus murder, is capital murder.
 21 Okay. Do you follow me?

22 A. Yes.

23 Q. All right. Now, the law says -- there's a bunch of
 24 elements because we got two crimes. There's got to be this guy
 25 and it's got to be in Nueces County, Texas, and it's got to be

1 on or about the given day, okay?

2 The law says the State has to prove all their
 3 elements. They don't get to prove like nine out of ten or
 4 whatever it is, okay? They got to prove them all. That makes
 5 sense really, too, because, I mean, the State could prove every
 6 element, and one element is it's not him, right?

7 A. Right.

8 Q. But you've got to prove every element. So would you
 9 hold them to that burden and make them prove every element
 10 before you found this defendant guilty of capital murder?

11 A. Yes, sir.

12 Q. Okay. All right. In Texas, criminal trials work
 13 like this, bifurcated system. What does that mean? Two parts.
 14 Two parts. First part, all we do is hear evidence about
 15 whether the State can prove the allegation, that is, guilt or
 16 innocence. Well, not really guilt or innocence. It's guilty
 17 or not guilty. All right. We call it the guilt or innocence
 18 phase, but it's really the guilty/not guilty phase. If the
 19 State can prove the defendant guilty, then we go on to the
 20 second phase. If they find -- if the jury finds the defendant
 21 not guilty, the case is over with. We go home, okay?

22 Let's talk about the instance if the defendant
 23 is found guilty, okay? There's two things that can happen in a
 24 capital murder case if a defendant's found guilty in Texas,
 25 only two punishments: Life in prison or the death penalty.

1 background? You know, of course, the opposite can be true. Is
 2 he a person of bad character, you know, is he a liar, a cheat,
 3 and a thief? Those are all -- those are all characteristics of
 4 a person's character, right?

5 And his background. What's that? Well,
 6 that's, you know, how he grew up, his family life, how did he
 7 grew up as a child, was he abused, or did he have a great
 8 childhood, you know? Do you follow me?

9 A. Yes.

10 Q. All right. And the personal moral culpability of the
 11 defendant. That's a hard thing to -- when you read it to know
 12 what it means, right? You agree with me; that's legalese?

13 A. Yeah.

14 Q. Okay. Let me try to give you an example of what that
 15 is. Two burglars. One burglar breaks into a house to steal.
 16 One burglar breaks into a house, just trashes the place, just
 17 trashes the place, steals everything of value, TVs, VCRs, CD
 18 player, computer, jewelry, anything of value, sells it, spends
 19 all the money on cocaine and hookers, okay?

20 A. Okay.

21 Q. That's one person. A second person, worked at a job
 22 20 years, gets laid off, got three kids, single parent, and
 23 they pretty -- they've been living -- they're barely making it
 24 as it was even with the job that he had. And now, all of a
 25 sudden, they got no money. So what he does is, he goes into

1 They're both very serious.

2 Now, on the second part of the case you may hear
 3 more stuff, okay, and we'll talk about that in a minute. But,
 4 in any event, second phase of the trial you hear more stuff,
 5 and the jury doesn't say life or death after they -- when they
 6 go back for deliberations, like they say guilty or not guilty.
 7 They say the -- they answer questions, and here's one of them.

8 "Is there a probability that the defendant would
 9 commit criminal acts of violence that would constitute a
 10 continuing threat to society?" What does that mean? Is it
 11 probably true -- is it more likely than not, 51 percent maybe,
 12 that the defendant would commit criminal acts of violence that
 13 would constitute a continuing threat? Is it more likely than
 14 not that he is going to be violent with people in the future,
 15 okay? It doesn't mean he has to be a killer, but, you know,
 16 he's got to be violent.

17 A. Right.

18 Q. Okay. The jury would answer yes or no. Then they
 19 would go over to No. 2. "After taking into consideration all
 20 the evidence, including the circumstances of the offense" --
 21 what's that? That's the first part of the trial, guilt or
 22 innocence phase -- "the defendant's character and background." Well,
 23 what's character? Character's like what kind of person
 24 he is. Is he an honest person? Is he a trustworthy person?
 25 Is he a person of high moral standards? Okay. And what's his

1 someone's house. He doesn't break in, but the door's open, and
 2 he steals food because the kids hadn't eaten in three days.
 3 And he hadn't eaten in three days. But he doesn't eat it
 4 himself. He just feeds it to the kids, makes sure they get a
 5 nice meal.

6 Now, do you think the personal moral culpability
 7 of those two people is the same?

8 A. No.

9 Q. It is not.

10 A. Huh-uh.

11 Q. That gives you an idea of what that's about, okay?

12 A. Yes.

13 Q. Personal moral culpability, how blameworthy are they.

14 They're both guilty, okay? They both did something wrong.

15 A. Right.

16 Q. Okay. But one of them did something extremely
 17 selfish and the other one -- you know, I guess, it's selfish in
 18 the sense that he's wrong to take from others, but it was for
 19 the benefit of a third party?

20 A. Right.

21 Q. Okay. Now, after considering all that, is there a
 22 sufficient mitigating circumstance or circumstances to warrant
 23 a sentence of life imprisonment rather than a death sentence be
 24 imposed? All right. What is a mitigating circumstance?
 25 Mitigating means, of course, to lessen, all right, a lessening

1 circumstances. Well, what could that be? Well, maybe you hear
 2 at the second part of the trial the defendant is a war hero.
 3 He saves a platoon of soldiers in Iraq, and at the risk of his
 4 own life. He got a medal for it, a Congressional Medal of
 5 Honor, okay? You might think that is a mitigating
 6 circumstance, okay? Is it justification for the crime? No.
 7 You found him guilty. And if we're at this point he's getting
 8 life or death, so it's not an excuse for the crime.

9 A. Right.

10 Q. The question is, is it a mitigating circumstance?
 11 Maybe he hear he was an Eagle Scout, maybe you hear he's just
 12 good in the community.

13 Now, what is a mitigating circumstances, only up
 14 to the jury to decide. These lawyers may try and tell you what
 15 it is. They'll suggest to you what they think it is. Only the
 16 jury gets to decide. Because you might say, "Well, I don't
 17 think that the fact that he was an Eagle Scout is a mitigating
 18 circumstance, but I think the war hero thing is a mitigating
 19 circumstance." Or, maybe you say, "I don't think any of this
 20 stuff is a mitigating circumstance." It's up to you, in other
 21 words.

22 A. Right.

23 Q. So what is this question about? Is there sufficient
 24 mitigating circumstances? Is it enough? In other words,
 25 taking everything in the whole trial together, is there enough

1 penalty. I'm not going to consider it." And neither of those
 2 people can take that oath. It's okay for them to feel that
 3 way, but it isn't okay for them to get on that jury, okay?

4 A. Yes.

5 Q. I'm asking you, can you take that oath?

6 A. Yes.

7 THE COURT: Okay. Mr. Skurka.

8 MR. SKURKA: Thank you, Judge.

9 VOIR DIRE EXAMINATION

10 BY MR. SKURKA:

11 Q. Hi, Ms. Leal, how are you today?

12 A. Just fine. Thank you.

13 Q. I know it's late in the day, but there's a few
 14 questions I need to go over with you. And so I'm going to
 15 start by telling you there's no right or wrong answers to
 16 anything you say. We just kind of want to know how you feel.
 17 Please don't answer a question and say, "Well, I better answer
 18 it this way because that's probably the way the judge wants me
 19 to say it --

20 A. Right.

21 Q. -- or the defense wants to say it, or you want me to
 22 say it." You just tell us how you feel, and we'll deal with
 23 all that. As the judge said, it's a pretty serious case and we
 24 want to make sure we have a person that's qualified for the
 25 jury, okay?

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1 good stuff about him to warrant a life sentence rather than a
 2 death sentence? Does it outweigh the bad that I've heard?

3 A. Right.

4 Q. Okay. Because considering the circumstances of the
 5 offense, I don't know what his background's like. Maybe he had
 6 a bad criminal history. Maybe he's always been in trouble,
 7 okay? Maybe the crime itself is so bad that you think that in
 8 and of itself, okay? But you've got to consider all this
 9 stuff.

10 A. Uh-huh.

11 Q. What this question says is, hey, look, stop and
 12 consider everything because maybe the good outweighs the bad
 13 and, therefore, he deserves life. He doesn't deserve to walk
 14 because we've already gotten past that. Can you do that?

15 A. Yes.

16 Q. Okay. Because, see, what happens is at the beginning
 17 of the trial I ask the jurors -- I swear them in, and they --
 18 what I ask them to do is do you swear that you'll render a true
 19 verdict based upon the law and evidence presented? They say
 20 yes. Some people cannot do that in this kind of case because
 21 they say, "I cannot participate in the process that could lead
 22 to a death penalty." Others say, "If I find him guilty, I'll
 23 give him a fair trial. But if I find him guilty, these
 24 questions mean nothing to me. I will not follow your law. I
 25 will always vote in such a way that he will get the death

1 A. Yes, sir.

2 Q. Are you related to the Leal family over at CCPD?

3 A. No.

4 Q. Okay. I thought you said --

5 A. My dad was a police officer. He's retired, but it
 6 was the Harlingen Police Department.

7 Q. I'm sorry. There's about three Leals that work over
 8 at CCPD.

9 A. I can imagine.

10 Q. That's why when I saw the Leal family, I thought that
 11 you were related to them because there's a bunch of them over
 12 there.

13 A. No. It's just -- we're mainly from the Valley. I
 14 moved here about 20 years ago.

15 Q. Okay. Okay. Because we all know the Leals. They
 16 call -- in fact, the father they call Papa Leal. That's his
 17 nickname. He's got two sons over there.

18 Okay. Let's talk about some of the issues in
 19 this case, if I could. And the first issue, as you might
 20 guess, from all the lead-in to all this is the death penalty.

21 A. Uh-huh.

22 Q. Just tell me in your own words how you feel about the
 23 death penalty, in general.

24 A. Actually, to tell you the truth, I really never
 25 thought about it, if that's an answer. There really have

1 been – I don't watch that much TV, so I never watch that much
 2 news. Any trial, any cases, I've never really paid attention
 3 to them. Personally, as long as I get straight answers and
 4 facts, and it's proven to where the death penalty is something
 5 that should be considered, I would have no problem with it.

6 Q. And that's kind of what I'm getting at. I'm not
 7 trying to tell you how you're going to do in this case, but
 8 it's like some people said exactly what you say. I've never
 9 really thought about it before I was confronted with it.

10 A. Right.

11 Q. So let's take you back to that day and remember we're
 12 in there, gosh, there's like 2 or 300 people downstairs. What
 13 about a week or two before that? If somebody had seen you like
 14 at a cocktail party or a coffee shop and for some reason the
 15 story came up or something came up about the death penalty,
 16 what would you have said? You just feel about the death
 17 penalty in general before you were kind of confronted with it?

18 A. Just actually the way I've always thought is if there
 19 is a reason enough and the crime fit the penalty, I would have
 20 no problem with the death penalty.

21 Q. You sound like you're saying when you say a reason, I
 22 hear evidence?

23 A. Evidence --

24 Q. If there's evidence for facts to say that. And you
 25 say if it fits that –

1 Q. -- if it fits the crime?

2 A. The severity of the crime, exactly.

3 Q. And then you said there's a reason for it. I mean,
 4 you would want to have all the evidence at first?

5 A. Yes, sir.

6 Q. And, of course, that's what you should have. Some
 7 people come and tell us that, "Look, I believe in the death
 8 penalty. I think it's a good law. I think we should have the
 9 law on the death penalty. I'm for the death penalty. But
 10 don't make me be the one to make that decision because it's an
 11 awesome responsibility."

12 A. Yes.

13 Q. How do you feel about being put in that position,
 14 that you might have to make that decision?

15 A. It is my responsibility, if I am chosen as a juror.
 16 And like, you know, my father was a police officer, was a
 17 detective. He raised us to take this very seriously, not to
 18 try to get out of it like mostly everybody does. You go -- if
 19 you're chosen, answer honestly. My mom's the same way. She's
 20 in the health field, so we just always have been taught to take
 21 this very seriously, and it is a responsibility we have to
 22 take.

23 Q. To respect jury duty?

24 A. To respect jury duty --

25 Q. Do your civic duty --

1 A. If it's the crime. If it goes with the crime, if it
 2 goes with the severity of the crime.

3 Q. That's a good word to use because you understand in
 4 Texas, not every murder case is a capital murder case.

5 A. Exactly.

6 Q. A lot of people have come to us and told us, well, I
 7 thought every murder case could be facing the death penalty.
 8 And we have to tell them no. The legislature says only certain
 9 kind of murder cases can face that. So if people are worried
 10 about, you know, it's just given indiscriminately in every
 11 murder case, no, it's not. The law has set out those certain
 12 more heinous crimes, I guess, those more serious crimes --

13 A. Exactly.

14 Q. -- where you're eligible for the death penalty, like
 15 killing a cop on duty, killing a kid under six, you know,
 16 killing more than one person at the same time; or while you're
 17 robbing, raping, kidnapping, or burglarizing. I mean, those
 18 are serious felonies; would you agree?

19 A. Yes.

20 Q. So I think you agree with the law that you probably
 21 think I understand why it's not just for every case.

22 A. Yes.

23 Q. It's only those certain cases. That's kind of what
 24 you meant when you say --

25 A. Yes.

1 A. Exactly.

2 Q. -- I guess?

3 A. Yes, sir.

4 Q. And I understand that's good. But you understand
 5 where I'm coming from. Some people say, you know, I could be a
 6 juror. Give me a DWI case. Give me a shoplifting case.

7 A. Yeah.

8 Q. Give me a burglary case. Don't make me do this kind
 9 of case. Did you feel that way --

10 A. No, sir.

11 Q. -- when the judge told you what kind of case it was?

12 A. No, sir.

13 Q. Okay. The reason I ask is because it's very simple.

14 We're not talking about something you heard in the news or read
 15 about in the paper or somewhere else. That's him that man in
 16 the purple shirt. There's gonna come a time -- and I told you
 17 the very first day -- I don't mince words -- the State has
 18 decided to seek the death penalty in this case. And if you're
 19 sitting on that jury one day, Lorraine Leal may be forced to
 20 look at all the evidence and make a decision that could lead to
 21 that person's execution. Can you look at him and tell me you
 22 can do that if you think the evidence is there?

23 A. Yes. Uh-huh.

24 Q. No hesitation about that?

25 A. No, sir.

1 Q. Notice how it says, "if the evidence is there"?

2 A. Yes, sir.

3 Q. Because I want to ask you the other way. If you
4 think that the person is not guilty, can you look at him and
5 say you're not guilty based on the evidence?

6 A. Yes, sir.

7 Q. And if you think that maybe he shouldn't get the
8 death sentence, maybe the evidence shows or points to him
9 getting the life sentence, can you vote for that?

10 A. Yes, sir.

11 Q. That's what I'm trying to figure out if you're
12 leaning one way or the other.

13 A. No, sir.

14 Q. You're not. Okay. That's fine I'm not trying to
15 pick on you.

16 A. No, no. I understand.

17 Q. I need to know which way you're going, because some
18 people say, "Look, if he's found guilty, I'm automatically
19 going to give him the death penalty." And I always tell them,
20 "It's not automatic. There's certain questions you have to
21 answer before you can do something like that." So, you don't
22 have a problem being a part in this type of a jury in a capital
23 murder case?

24 A. No, sir.

25 Q. And you're not leaning one way or the other?

1 constitutional right just like you would or anybody else would.
2 Sometimes jurors say, "Well, gosh dog it, I want to hear both
3 sides of the story. I want to hear what he says, because if it
4 was me, I would testify and try to defend myself." But the law
5 says, no. The judge says, we'll give you instructions, if he
6 doesn't testify, that says you can't hold that against him.

7 Can you follow that law?

8 A. Yes, sir.

9 Q. Okay. And you understand the importance of that law
10 too, because if somebody says, "Well, I want to find him guilty
11 just because we didn't hear from him," that wouldn't be fair
12 either, would it?

13 A. No.

14 Q. Okay. Now, you know this is a capital murder case
15 because it's murder plus a robbery?

16 A. Yes.

17 Q. I don't want to spend a whole lot of time in there.
18 You'll hear what a robbery is. Essentially, it's that taking
19 something by force or threats of force.

20 And there's two parts to this trial. Have you
21 ever been on a jury before?

22 A. No, sir.

23 Q. Okay. It's very simple. And every criminal case is
24 like this. There's two parts to. The first part is, did he do
25 it or not? Is he guilty or not? You don't think about how to

1 A. No.

2 Q. Remember the judge talked about presumption of
3 innocence. Everybody starts their trial with the presumption
4 of innocence. Remember they told you that little test how
5 would you have to vote if you had to vote right now?

6 A. Right.

7 Q. And what that basically means is that means you have
8 to start them off at innocent. It's up to the State to prove
9 that he's guilty beyond a reasonable doubt. In other words,
10 this isn't like other countries where they say, well, you're
11 guilty and you have to prove your innocent. The jury has to
12 come in here and say, you know, I believe he's innocent, and
13 the State has to prove he's guilty.

14 Now, I will tell you that's just a presumption.
15 It doesn't mean that he is innocent. It's just right now he's
16 presumed innocent because you haven't heard any evidence --

17 A. Exactly.

18 Q. -- toward him. Now, I anticipate that the
19 presumption's going to change once I start putting on evidence.
20 But you have to start at that beginning, that he's presumed
21 innocent. Can you do that?

22 A. Yes, sir.

23 Q. And remember the judge says he doesn't even have to
24 testify if he don't want to, and you can't hold that against
25 them. That's the old Fifth Amendment; remember that? He has a

1 punish him yet because you haven't even found him guilty yet.

2 A. Right.

3 Q. Because if you find -- if you don't think there's
4 enough evidence beyond a reasonable doubt, your vote would
5 be --

6 A. Not guilty.

7 Q. -- not guilty. Okay. And if it is beyond a
8 reasonable doubt, you find him guilty. Then there's the second
9 part of the trial. Generally speaking, the first part of the
10 trial is just about what happened that day. What are the
11 surrounding circumstances of the crime itself and did he commit
12 the crime? The second part of the phase, if you find him
13 guilty, you go on to more background stuff, more other
14 information about the person. Is he a good guy? Is he a bad
15 guy? Does he have a long history with the law? Does he
16 have -- you know, never been in trouble with the law, you know,
17 anything? Do you see what I'm saying?

18 A. Yes.

19 Q. That's what helps you make up your mind on what the
20 punishment is. The law says just because you find him guilty
21 of capital murder, you don't automatically give the death
22 penalty. And you can't be a fair juror if you do that. You
23 listen to everything, and then based on that evidence, that
24 maybe that extra evidence, so to speak, you might be able to
25 make a decision on that. And you answer two questions. If

1 you're ever on a criminal jury, generally speaking, there's a
 2 range of punishment like, say, two years to 20 years in prison.
 3 And people always say, "Well, why do they make it so wide a
 4 range?" And I go because every case is different and every
 5 person is different.

6 Have you ever seen that in the news where, you
 7 know, reading the newspaper that somebody gets sentenced to
 8 burglary and gets 20 years in prison? And then in another
 9 courtroom, somebody gets sentenced to burglary and gets five
 10 years probation. And you think, well, why did one guy get 20
 11 years and one guy get probation? What kind of reason would
 12 you think that would be?

13 A. It's the mitigating circumstances the judge was
 14 talking about.

15 Q. That's right. It's either mitigating circumstances
 16 or aggravating circumstances. You know, the guy who got 20
 17 years in prison, the maximum sentence, there's probably
 18 something horrible about his crime or his background, maybe
 19 because of the highest. On the other hand, the person who got
 20 probation, maybe he's a first time offender. Maybe he doesn't
 21 have a bad history. You answered that exactly right. That
 22 tears people up. They always think everything should be equal.
 23 And I say, well, every case is different.

24 So the judge tells you to answer these two
 25 questions. The first one is right behind you on the board, and

1 him up and he can't ever hurt anybody." And then I always say,
 2 wait a minute, what happened -- who else is in a prison besides
 3 the defendant?

4 A. The other prisoners.

5 Q. Exactly.

6 A. Is that who you're talking about?

7 Q. It's not a trick question.

8 A. I was all --

9 Q. It's not a --

10 MR. SKURKA: Could we get her some water?

11 A. I have some.

12 Q. (BY MR. SKURKA) That's okay. It's not a trick
 13 question or there or anything. But seriously, prison, there's
 14 other prisoners, there's guards, there's people that work at
 15 the prison. In other words, what I'm trying to say is, you
 16 know, when you're locked in prison, that doesn't mean you're on
 17 a desert island where no one else is around. There's other
 18 human beings you still interact with. Have you ever heard
 19 about that in prison, like maybe somebody hurting another
 20 prisoner or, you know, prisoners attacking the guards or
 21 something like that? You've heard of that?

22 A. Yes.

23 Q. So would you agree with me just because you're locked
 24 up in prison doesn't mean you can never hurt anybody again?

25 A. Right.

1 there's some key words I want you to look at. The first --
 2 part -- it says is there a probability. In other words, is
 3 there a good chance, not certainty, because unless you got a
 4 crystal ball and you can look in the future, there's no way I
 5 can prove to you 100 percent what's going to happen in the
 6 future. And the law doesn't require me to. It just says, is
 7 it probable that he would do these things. It also says,
 8 "would commit criminal acts of violence." Some people say,
 9 "Well, gee, Mark, I can't give the death penalty unless I think
 10 he's going to murder somebody again or do another capital
 11 murder." And I say, "It doesn't say he has to be committing
 12 another murder. It says commit criminal acts of violence. It
 13 could be like, you know, punching somebody in the nose, you
 14 know, just any kind of crime of violence."

15 And the last part says, "would constitute a
 16 continuing threat to society." Can you tell me what that
 17 means to you, that phrase, "continuing threat to society"?

18 A. Would continue to do criminal acts, try to rob
 19 people, maybe assault somebody, just --

20 Q. Yeah.

21 A. -- in that threat.

22 Q. The key what we call it is future dangerousness.
 23 He's gonna be a danger in the future to our society. But some
 24 people say, "Well, gosh, why do you have to seek the death
 25 penalty? You could give him a life sentence, and that locks

1 Q. Okay. It sounds a little funny because it says
 2 society and you think like in the outdoor in the open society.
 3 And prison is really its own society because they still got
 4 people around there, right?

5 A. Right.

6 Q. Okay. So that's what that question says. Is he
 7 gonna be a danger in the future, so to speak; yes or no. If
 8 you answer that question yes, then you go to the next question.
 9 The next question is the mitigating circumstances question.
 10 And I think the judge did a pretty good example about the
 11 different burglars and how you would treat different people.
 12 But the key word, of course, is mitigating. And that means
 13 anything that would lessen or make less severe the punishment.
 14 They did the crime. Is there any reason to give him a break
 15 and give him life instead of the death penalty? Can you make
 16 that decision before you hear anything? No. And what you --
 17 what the judge is telling you to do is this: Okay. You found
 18 him guilty of capital murder. You think he's guilty. You
 19 think he's a continuing threat to society. He might hurt
 20 somebody in the future. But stop. Before you make a decision,
 21 the judge tells you, take into consideration all of the
 22 evidence, including the circumstances of the offense, like what
 23 happened that day? Did he have a big role in the crime, a
 24 small role in the crime? Was it a really horrible, heinous
 25 crime, or was it kind of not that bad? Then you look at his

1 character and his background. Remember that second part of the
 2 trial? You might get to hear was he a good guy or was he a
 3 bad guy? Did he have good character or did he have bad
 4 character? And his personal moral culpability, taking into
 5 consideration all that, is there enough? Is it sufficient of a
 6 mitigating circumstance to warrant that a sentence of life
 7 rather than the death sentence be imposed? I think that's what
 8 the State of Texas does. They don't want you rushing into
 9 anything. And it's kind of like the old checks and balances,
 10 you know, you always used to hear in school about the
 11 government checks on stuff because it looks like he's heading
 12 for the death penalty. But before you give the death penalty,
 13 look at everything and see if there's any reason to give a life
 14 sentence.

15 Mitigating circumstance could be anything – if
 16 the jury thinks it's a mitigating circumstance. There's no
 17 definition. It's not like you say, well, because he's an
 18 orphan I have to lower the sentence; because he came from a
 19 broken home, I have to lower the sentence; because his dad was
 20 an alcoholic, I have to lower the sentence. You know, because
 21 he made good grades in school and was on the honor roll back
 22 then. You know, because he was a war hero, I have to lower the
 23 sentence.

24 What I'm saying is just to consider all those
 25 things, but you, the jury, give whatever weight that you

1 Mitigating is kind of like the opposite of
 2 aggravating. Some reasons it might go low; some reasons it may
 3 go high. Mitigating would make it less in a sense.
 4 Do you think that's kind of a fair question to
 5 ask before you make a hard decision --
 6 A. Yes.
 7 Q. -- like this? Because you want to know the
 8 background. And you want to know if there's any reason. But
 9 I'm looking for jurors that can follow through with it. If you
 10 think there's -- he's guilty and that you think, yes, he's a
 11 continuing threat to society, and no, there's not enough to
 12 outweigh the mitigating circumstances, can you sentence him to
 13 death?

14 A. Yes, sir.

15 Q. And if you -- the other way, if you think that there
 16 is a possible mitigating circumstance, or you think, no, I
 17 don't think there's a chance he's gonna hurt somebody else, can
 18 you vote for a life sentence?

19 A. Yes, sir.

20 Q. I keep saying vote for death or life, but you really
 21 don't check off death or life when you answer those questions.

22 A. Right.

23 Q. The last thing I want to talk to you about on this
 24 part is a law that you may hear in this case is this.

25 "Voluntary intoxication is not a defense to crime."

1 think's important. In other words, some people may say, "Well,
 2 you know, he came from a broken home and maybe we should lower
 3 the sentence because of that." Or, you know, "He was an Eagle
 4 Scout in high school, so maybe we should give him a break
 5 because he was an Eagle Scout in high school." That could be a
 6 possible mitigating circumstance, but other jurors may say,
 7 "Look, that doesn't outweigh all the other bad things." It's
 8 kind of like, is there enough good that outweighs all the bad
 9 that he's done. There may be some good things in there, but
 10 the question is, is it enough to outweigh all the bad things?
 11 Some people may say, "Well, that's good that he was an Eagle
 12 Scout, but that doesn't excuse his behavior and make me give
 13 him a lower sentence." Do you see what I'm saying?

14 A. Yes, sir.

15 Q. I guess the base word to say is open-mindedness.
 16 Remember the judge said – the first thing the judge said,
 17 would you be able to listen to everything and consider it and
 18 give fair consideration of his background and the circumstances
 19 of the defendant. Some people may say, "Yeah, I can consider
 20 that and reduce the sentence." Some people may say, "No, I
 21 don't think that's enough." You see what I'm saying?

22 A. Yes.

23 Q. That up to the jury. The defense may bring evidence
 24 about that, but that doesn't mean you have to necessarily lower
 25 the sentence.

1 voluntary intoxication. In other words, if you go get yourself
 2 drunk or high on drugs, can you go up to the Court and say,
 3 well, I'm not guilty because I was drunk when I did that?
 4 Absolutely not. It's not a defense or an excuse to crime. You
 5 can't just go rob a bank and say, "Well, I'm not guilty of
 6 robbing that bank because I was drunk when I did it." No,
 7 because that's not an excuse to crime. However, it's a
 8 possible mitigating circumstance. Maybe some juror will say,
 9 "Yeah, he robbed the bank but, you know, that's a mitigating
 10 circumstance that he was drunk. So I'm gonna give him a lower
 11 sentence." Other people may say, "Well, I don't care if he was
 12 drunk or not if he robbed the bank. He still robbed the bank
 13 and he's got to pay for that." Do you see what I'm saying?

14 A. Yes.

15 Q. So intoxication may be a possible mitigating
 16 circumstance. Again, just like anything else, it may lower the
 17 sentence, but it doesn't have to lower the sentence. Okay.
 18 Are you with me on the scheme?

19 A. Uh-huh.

20 Q. Does that make sense going through all those things?
 21 A. Yes, sir.
 22 Q. Because you got to start off that he's guilty.
 23 Then -- you know, then you have to answer that question and the
 24 other question before you can get to the death penalty. And I
 25 think it's pretty careful – clear that everybody will want the

1 juror to be careful about this.

2 The last few things I want to talk to you about
3 are a couple of legal issues. Remember that just because he's
4 indicted, that he's charged with a crime, does that mean he's
5 guilty of the crime?

6 A. No, sir.

7 Q. No, it just means the State has brought charges. Who
8 has to prove the case beyond a reasonable doubt?

9 A. (Indicating.)

10 Q. I do. Go ahead, you can lay that burden on me
11 because that's my job. That's exactly right. And I have that
12 burden in this case and every other case. I've tried plenty of
13 cases, and they all start with, I have to prove them guilty
14 beyond a reasonable doubt. And that's the way it should be,
15 right?

16 So that doesn't bother me at all. All I want to
17 make sure is the burden of proof is beyond a reasonable doubt.
18 It's not beyond all doubt or a shadow of a doubt, any doubt.
19 You know, you always hear that stuff on TV, and it drives me
20 crazy because the judge is gonna tell you it's only beyond a
21 reasonable doubt. Don't hold me to a standard higher than
22 that.

23 A. Right.

24 Q. I mean, there's no way like you could believe it – I
25 could prove it to you 100 percent unless you were there and you

1 A. Yes, they are.

2 Q. But you don't agree with that?

3 A. No, sir.

4 Q. Tell me a little bit about that, please.

5 A. I go to the one on Saratoga. They are always
6 discussing -- because they're involved in a lot of -- or they
7 were on the news a lot, and they want you to be involved in
8 praying over them. And it's nothing I particularly agree with.

9 Q. What do you mean praying over them?

10 A. You know, you pray for them and you pray for --

11 Q. Pray for who?

12 A. For whoever was on trial, whoever committed whatever
13 act, they do get involved a lot with -- and not so much
14 involved personally, but they'll read the paper, they'll watch
15 the news, they'll become involved in saying, you know, if any
16 of you-all have heard about this or read about this, and we
17 want to pray for that person and --

18 Q. Somebody who's on trial or been convicted?

19 A. Trial, been convicted, or has committed some type of
20 serious crime that they just feel that the person was -- I
21 don't know, that the person didn't mean to do it or -- it's not
22 my opinion. It's -- like I said, my parents have raised me to
23 be fair, but there is times when something that's serious needs
24 to be handled by the Court. It needs to be handled by the
25 judge and whatever lawyers and whatever jury is.

1 saw the whole thing, and then you couldn't be a juror in the
2 case. Do you see what I'm saying?

3 A. Uh-huh.

4 Q. Some people say, "Well, I have a doubt." And then my
5 question is, well, is it a reasonable doubt. Do you have a
6 reason for that doubt? Not that, oh, it just feels that way or
7 something. I mean, is there a real reason that you can put
8 your finger on things, because of this, I think this.

9 The other thing, I think we talked about the
10 Fifth Amendment. He doesn't have to testify. You're not
11 gonna hold that against him?

12 A. No.

13 Q. The defense doesn't have to put on evidence. They
14 can just remain silent. After I finish, they don't have to say
15 anything, and you cannot hold that against him.

16 A. Right.

17 Q. It's a natural inclination that sometimes people want
18 to hear both sides of the story, but you may not hear that.
19 You won't hold that against him, right?

20 A. No, sir.

21 Q. And you shouldn't because I have to prove the case.
22 They have to prove nothing.

23 I don't think I have any other questions for
24 you. I think you said something about your church is against
25 the death penalty?

1 Q. Okay. So if I'm reading you right, what you're
2 saying is even though your church kind of is against the death
3 penalty, you have your own mind and you make your own
4 decisions?

5 A. I have my own mind and my own opinion.

6 Q. That's fine. We have people here who are Catholics,
7 and they say, Look, my church is against the death penalty, but
8 that's just not one of the teachings that I follow.

9 Okay. I don't think I have any other
10 questions. Do you have any questions of me? I know I've been
11 talking a while. I hope I explained everything to you okay.

12 A. Yes, you did.

13 Q. If you have any other questions, that's fine. But,
14 if not, I'll let the other lawyers talk to you now. Thank you,
15 Ms. Leal.

16 MR. GARZA: May I proceed, Your Honor?

17 THE COURT: Yes.

18 MR. GARZA: Thank you.

19 VOIR DIRE EXAMINATION

20 BY MR. GARZA:

21 Q. Ms. Leal, my name is Ed Garza. I had previously
22 introduced myself, I think, back when you-all were together as
23 a group.

24 A. Yes, sir.

25 Q. And my co-counsel is Mr. Grant Jones, and our client,

1 over here is John Henry Ramirez.
 2 What is Trisun C. C. River Ridge?
 3 A. Trisun Care Center River Ridge is a nursing home.
 4 Q. Oh, it's a nursing home?
 5 A. Yes.
 6 Q. All right. Okay. And you're the director of human
 7 resources?
 8 A. Yes, sir.
 9 Q. Is that correct?
 10 A. Yes.
 11 Q. How long have you been there, two and a half years?
 12 A. Two and a half years, going on three.
 13 Q. Okay. How did you get into that business or into
 14 that --
 15 A. Sheer luck.
 16 Q. Really?
 17 A. Yeah. I had some courses in HR, and I've had
 18 management background, so when they were looking for somebody,
 19 you know, a friend of a friend referred me to them, and I got
 20 the job.
 21 Q. Okay. And you've been living here in Nueces County
 22 for about 20 years?
 23 A. About 20 years.
 24 Q. Okay. Whenever a person is on trial here in Texas,
 25 we ask that jurors come before the task of being on jury duty

1 with an open mind and with a sense of impartiality, okay?
 2 A. Yes, sir.
 3 Q. What does impartiality mean to you?
 4 A. It means that I don't -- I'm not partial to him
 5 either being guilty or not guilty. It's like he said, it's up
 6 to you to prove to me that he's innocent. I really don't have
 7 an opinion on it coming in. And he is innocent right now until
 8 you prove him, you know, innocent, period, where he proves him
 9 guilty.
 10 Q. Okay. Now, do you understand we don't have to prove
 11 anything?
 12 A. Yeah, that's right. Sorry.
 13 Q. Okay.
 14 A. Until he proves him guilty or --
 15 Q. Yeah. I just want you to understand the concepts or
 16 the fact that they have the burden of proof and that it has to
 17 be beyond a reasonable doubt. What does reasonable doubt mean
 18 to you?
 19 A. That if I have any doubt on the evidence that they
 20 presented, then that is a reasonable doubt to prove him
 21 whichever way that we -- the jury decides.
 22 Q. Okay.
 23 A. I have to have no doubts whatsoever, but if there's
 24 doubts pertaining to their evidence.
 25 Q. And if you have a doubt as to the evidence, and if

1 you have a doubt as to the case, then you would have to return
 2 a verdict of not guilty?
 3 A. Not guilty.
 4 Q. Is that correct?
 5 A. Yes, sir.
 6 Q. Okay. Now, in Texas, only certain cases, like the
 7 judge has explained to you, are capital murder cases, okay?
 8 A. Yes.
 9 Q. In other words, they have to be a homicide or a
 10 murder coupled with yet another very serious crime such as a
 11 robbery or a kidnapping or a burglary, or a rape or something
 12 like that?
 13 A. Yes.
 14 Q. Okay? Because not all murders have available the
 15 death penalty as a possible punishment, okay?
 16 A. Yes, sir.
 17 Q. There can be some horrific terrible, you know,
 18 factual murders that occur, but the death penalty is not a
 19 punishment for any jury to consider in those kind of cases.
 20 A. Right.
 21 Q. Okay? So there are two parts to a criminal trial all
 22 the time. The first part is the guilt/innocence part, okay?
 23 And then if need be, there's also a punishment part, okay? If
 24 you don't get to the punishment part, well, then everybody just
 25 goes home.

1 A. Right.
 2 Q. It's over with, okay? But in Texas, in order for you
 3 to consider these two special issues, what has to occur first?
 4 A. I'm sorry. I don't understand the question.
 5 Q. Before you can consider these two special issues --
 6 A. Right.
 7 Q. -- okay, what part of the trial has to occur first?
 8 A. That we give a guilty decision.
 9 Q. Okay.
 10 A. These two questions behind me.
 11 Q. So, in other words, you have to convict our client --
 12 A. Right.
 13 Q. -- don't you, before you can even consider these
 14 issues; is that correct?
 15 A. Yes.
 16 Q. Okay. Special Issue No. 1, the future dangerousness
 17 issue, requires that all 12 jurors decide unanimously that our
 18 client would constitute or continue to be a threat to society?
 19 A. Right.
 20 Q. He'd have to decide that unanimously, okay?
 21 A. Right.
 22 Q. Because it would go against his -- it would go
 23 against his interest, wouldn't it?
 24 A. Yes.
 25 Q. So, therefore, it would be fair to say that all 12

1 should decide --

2 A. Should agree.

3 Q. -- unanimously, correct? Okay. Now, if you were to
4 say if -- if the State has no way of convincing you through any
5 of their evidence that there is a probability that he would be
6 a continuing threat to society, then you would say no to that
7 issue, wouldn't you?

8 A. Right.

9 Q. Now, the rules say up to 10 of you there's only
10 needed up to 10 of you to agree to that issue in order to stop
11 the trial right there and then submit that verdict to the
12 judge. And what would happen at that time, in your
13 understanding of these concepts?

14 A. With this first question?

15 Q. Right.

16 A. Would -- I'm sorry, I have to read it again. If we
17 all, like you said, 10 agree that he is not a threat to
18 society, then the -- it would be life imprisonment --

19 Q. Correct. That's exactly right.

20 A. It wouldn't be death.

21 Q. That's exactly right. Everything stops right there.

22 A. Right.

23 Q. But, if things don't go favorably, let's just say,
24 and all 12 of you decide that you are convinced that he is a
25 continuing threat to society, then and only then do we ask you

1 say that you're a person of good character, what would I be
2 saying about you?

3 A. Just that I have a good moral character, a good --
4 basically good person, hardworking person. It could mean a
5 range of things.

6 Q. Okay. It's like a code of values, isn't it, sort of?
7 Trustworthiness, honesty, the Ten Commandments, the Boy Scout
8 Creed --

9 A. Right.

10 Q. -- things of that nature that you learn. It's some
11 of the things you might learn at church, correct?

12 A. Yes, sir.

13 Q. What about background?

14 A. Background --

15 Q. What does background mean to you?

16 A. Background means where I grew up or where anybody
17 grew up, part of the neighborhood we grew up in, what kind of
18 family life did I have, what kind of school life did I have,
19 friendships, no friendships. It's my background.

20 Q. And then let's get down to this personal moral
21 culpability. I think the judge told you that has to do with
22 the degree of a person's guilt or a person's blameworthiness,

23 A. Right.

24 Q. Okay. He gave you the comparison between the guy
25 that was out trying to burglarize and make money --

1 to consider Special Issue No. 2, okay?

2 Now, Mr. Skurka went over it with you, and you
3 read it, and he gave you some examples. Do you understand that
4 particular issue?

5 A. Yes, sir.

6 Q. What does mitigating mean to you?

7 A. There is a circumstance that allows -- that he should
8 get life imprisonment and not death. There is something in
9 his -- like he told me the question -- like the judge told me
10 the question, there's something in his background, there's a
11 situation that surrounded the crime itself that would deem it
12 life imprisonment and not death.

13 Q. Okay. Would it mean it's sort of lessens --

14 A. It lessens the crime.

15 Q. Okay. That's what it means. It means it lessens it.

16 A. Excuse me.

17 Q. And we would ask you to consider the circumstances of
18 the offense, the defendant's character and background, and the
19 personal moral culpability, okay?

20 Now, what does character mean to you?

21 A. Character means it's almost like their personality,
22 the way they have carried themselves throughout their lives,
23 the way they act with other people, the way they associate with
24 other people in their everyday surroundings.

25 Q. Would it have to do with things -- like if I were to

1 A. Right.

2 Q. -- for his coke habit, and other immorality versus
3 the guy who had to make the moral choice of having to steal or
4 watch his family starve.

5 A. Right.

6 Q. That sort of created a dilemma for that person,
7 didn't it? Does that last situation create a degree of guilt
8 for that person compared to the other persons that you can
9 consider?

10 A. Yes, sir.

11 Q. And do you understand what we're asking you to
12 consider?

13 A. Yes.

14 Q. Okay. Now, a person's morality is sort of a person's
15 code of core values that we're hoping he or she has learned,
16 okay?

17 A. Okay.

18 Q. But would you agree with me that there might be
19 situations in which people are brought into this world or
20 raised where maybe they have not had an opportunity to learn
21 what these values are?

22 A. Yes, there are some situations, uh-huh,
23 circumstances.

24 Q. And so, therefore, they're incapable of knowing
25 whether a particular decision they make is a good one or a bad

1 one?

2 A. Right.

3 Q. Do you agree with that?

4 A. Yes, sir.

5 Q. Okay. So that they had no way of knowing the degree
6 of their culpability. If the evidence should show something to
7 that effect, what that question there is asking you is, can you
8 give it some effect, can you give it some thought? Will you
9 give it some consideration?

10 A. Yes, sir.

11 Q. Or is it something that just wouldn't matter to you?

12 A. No. I would think about it.

13 Q. Okay. We, as lawyers, defense lawyers especially, as
14 a consequence of the case where this language came from -- it
15 was a Supreme Court case that came down several years ago --
16 have now the obligation whenever we represent a client in these
17 types of cases, we have the obligation to investigate and bring
18 forth and try to sufficiently show a jury a person's background
19 for you to consider in giving this question your consideration,
20 okay?

21 A. Yes, sir.

22 Q. And so, if you've answered issue No. 1 yes, then
23 you've also gone over here to Special Issue No. 2. Depending
24 on how you answer Special Issue No. 2 is going to determine
25 whether our client gets either a life or death sentence?

1 A. Yes, sir.

2 Q. Is there any reason at all, ma'am, that you couldn't
3 be fair and impartial to both sides in this case?

4 A. No, sir.

5 Q. Okay. Anything at all going on in your employment at
6 your job, any planned vacations, anything at all that would
7 interfere with your services as a juror in this case --

8 A. No, sir.

9 Q. -- during the month of December?

10 A. No.

11 MR. GARZA: Thank you, ma'am. I don't think I
12 have any other questions.

13 THE COURT: Anything else?

14 MR. SKURKA: We have nothing else. Thank you,
15 Ms. Leal.

16 THE COURT: Please wait in the jury room.

17 We'll be right with you.

18 (Venireperson exits courtroom.)

19 THE COURT: What says the State?

20 MR. SKURKA: State will accept her.

21 THE COURT: All right. What says the defense?

22 MR. GARZA: We'll accept also, Your Honor.

23 THE COURT: All right. Bring her in.

24 (Venireperson enters courtroom.)

25 THE COURT: All right. Ms. Leal, you are on

1 A. Right.

2 Q. Okay? So, in other words, once a decision has been
3 made by you as a juror along with your other fellow jurors that
4 he is guilty of the offense of capital murder, that sort of
5 sets everything in motion.

6 A. Right.

7 Q. Serious things. And then once you decide Issue No. 1
8 unfavorably toward our client, there it goes again.

9 A. Right.

10 Q. The train is going down the track, okay? But then
11 you come to this issue here, and you have to give some real
12 serious thought to whether or not depending on how you answer
13 that, he's either gonna get a life or death sentence. So
14 either way you cut it, it's not any kind of a cake walk.

15 A. No, sir.

16 Q. Is it? It's pretty serious. So if you vote yes,
17 that you feel that there are certain sufficient mitigating
18 circumstances, then -- and our client basically ends up with a
19 life sentence.

20 A. Right.

21 Q. If you vote no, which will have to be, you know, all
22 of you-all unanimously, then he gets -- that authorizes the
23 judge to impose a death sentence.

24 A. Yes, sir.

25 Q. Okay. Do you understand all that?

1 the jury. We will be probably starting on December 1. That's
2 our plan. In any event, we'll let you know if that changes,
3 but we'll call and let you know. We're gonna give you a call
4 to confirm, okay?

5 JUROR NO. 11: Okay, sir.

6 THE COURT: Don't watch the local news or read
7 the local paper while this is going on. If somebody tries to
8 talk to you say, no, no, I can't talk to you. I can't talk to
9 about this. After the case is done, we can have a chat, but
10 not while it's going on, okay? All right. Thank you so much
11 for coming in.

12 JUROR NO. 11: Thank you.

13 MR. SKURKA: Thank you, ma'am.

14 (Juror exits courtroom.)

15 MR. SKURKA: Progress.

16 THE COURT: Progress. I guess we're off the
17 record.

18 (Discussion off the record.)

19 (Proceedings adjourned.)

1 THE STATE OF TEXAS

*

2
3 COUNTY OF NUECES

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5 I, Sara E. Rivera, Official Court Reporter,
6 in and for the 94th District Court of Nueces County, State of
7 Texas, do hereby certify that the above and foregoing contains
8 a true and correct transcription of all portions of
9 evidence and other proceedings requested in writing by
10 counsel for the parties to be included in this volume of the
11 Reporter's Record, in the above-styled and numbered cause,
12 all of which occurred in open court or in chambers and were
13 reported by me.

14 I further certify that this Reporter's Record of the
15 proceedings truly and correctly reflects the exhibits,
16 if any, admitted by the respective parties.

17 WITNESS MY OFFICIAL HAND, this the 25th day of
18 September, A. D., 2009.

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